UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA
BEFORE THE HONORABLE LARRY R. HICKS, DISTRICT JUDGE

ORACLE USA, INC., a Colorado corporation; ORACLE AMERICA, INC., a Delaware corporation; and ORACLE INTERNATIONAL CORPORATION, a California corporation, Plaintiffs, vs. RIMINI STREET, INC., a Nevada corporation; and SETH RAVIN, an individual, Defendants.	No. 2:10-cv-0106-LRH-VCF

TRANSCRIPT OF ORAL ARGUMENT RE
ORACLE'S RENEWED MOTION FOR PERMANENT INJUNCTION #1117
AND RENEWED MOTION FOR ATTORNEY'S FEES #1118

July 23, 2018

Reno, Nevada

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P R O C E E D I N G S

THE COURT: Good afternoon. Have a seat, please.

COURTROOM ADMINISTRATOR: Today is the date and time for oral argument regarding Oracle's renewed motion for permanent injunction, number 1117, and renewed motion for attorney's fees, number 1118, in civil case 2:10-cv-106-LRH-PAL, Oracle USA, Inc., and others, versus Rimini Street, Inc., and others.

Counsel, can you please state your appearances for the record.

MR. HIXSON: Good afternoon, Your Honor. Tom Hixson and John Polito from Morgan Lewis for Oracle, Richard Pocker and Beko Richardson from Boies Schiller Flexner for Oracle, and James Maroulis, managing counsel at Oracle for Oracle.

THE COURT: All right. Thank you, Mr. Hixson.

MR. PERRY: Good afternoon, Your Honor. Mark Perry from Gibson Dunn for Rimini Street. I'll be arguing the injunction piece.

Dan Polsenberg from Lewis Rocca will be arguing the fee piece.

We also have with us Dan Winslow, the general counsel of Rimini Street, and Jeffrey Thomas from Gibson Dunn, who is the partner in the *Rimini II* case, and also some of my colleagues from Gibson Dunn, and West Allen from the Howard and Howard firm.

Thank you, Your Honor.

THE COURT: All right. Thank you.

Well, preliminarily, let me say, I welcome you all back to the courtroom. It brings back memories of trial.

I'm candid to admit I've had more attorneys admitted in this case than any other case that's ever been before me. And similarly in court and in practice, we've had more attorneys attending than -- well, I've had some cases where we've had as many, but there were more parties involved.

So, well, let me inquire of you, Mr. Hixson and Mr. Perry. I know I entered the order that we would argue the injunction side of this first and then the attorney's fees.

Have you, between you, discussed who would be going first?

MR. HIXSON: Oracle is the moving party in both motions, so we hadn't discussed it, but I assumed that we would be going first.

THE COURT: I would assume so too. But just to make sure we're all on the same page.

And I indicated each side would have up to 45 minutes on each one of the two arguments.

And so that takes us to you, Mr. Hixson. You're welcome to go forward.

MR. HIXSON: Good afternoon, Your Honor. As you've indicated, the Court has given each side 45 minutes per motion. I would like to reserve 15 minutes of my time for rebuttal, with the Court's permission.

THE COURT: You certainly may.

MR. HIXSON: Concerning the permanent injunction, before I turn to the four *eBay* factors, I'd like to address two preliminary issues, and the first is the meaning of the Ninth Circuit's remand of the injunction to this Court.

The remand is important, but, conceptually speaking, it's not complicated. When the court of appeals reviews a decision by you on an injunction matter, they review it for abuse of discretion. So the court of appeals wants to know that they're reviewing an exercise that you did of your discretion.

They don't want to guess. They don't want to predict. They don't want to say, Well, in the situation it might be similar or different and the judge might have

ruled this way. They want to know. They want to know how you acted in that situation.

Here, in 2016, you originally reviewed and applied the four *eBay* factors to both Oracle's copyright infringement claim and our California computer access claim and applied them together. And that was the context in which you granted the permanent injunction.

The two injunctions were discrete. One was about the copyright infringement; one was about the California computer act, as the Ninth Circuit noted, but you review the *eBay* factors and your analysis together.

Now that the Ninth Circuit has reviewed the California state access claim, they sent this case back to you to exercise your discretion under Section 502 of the Copyright Act, and they want to know what you would do if presented with copyright infringement alone.

And they tell us that explicitly on page 964 of the opinion where they say:

> "We do not know how the district court would weigh the *eBay* factors with respect to the copyright claims alone."

And that's the scope of the remand. It's a straightforward issue.

Now, Rimini in their briefs tries to make a lot more of it. They say that the Ninth Circuit remanded with

instructions for you to do a lot more work on remand. At times Rimini even used the words "reversed" to describe what the Ninth Circuit did with the injunction, when, in fact, they simply vacated and sent it back.

But the Ninth Circuit is clear about what they want from you, and that's to exercise your discretion when it's just copyright infringement, are you willing to grant the permanent injunction.

Rimini does say there are hints and suggestions by the Ninth Circuit that the injunction was too broad, that it extended to certain product lines it shouldn't have covered, and things like that.

But the Ninth Circuit did not do any of that. None of that is real. And, in fact, the Ninth Circuit came right on you and told you that again on page 964 of their opinion, where they say, quote, We express no view on the propriety or scope of any injunctive relief, which are matters committed to the district court's discretion in the first instance.

And so this is an important remand, but it's a narrow one in scope: Are you willing to do the same thing when it's just copyright infringement as you did previously. And we believe that you should.

All of the reasons that you listed in your September 2016 order for granting the permanent injunction

continue to apply when it's just a copyright infringement claim.

Oracle has still suffered irreparable harm, the remedies at law are still inadequate, and the balance of hardships and the public interest continue to weigh in favor of Oracle.

As a testament to how similar the issues are to the ones you've previously considered, it's striking that so many of the arguments in Rimini's opposition brief are exactly the same ones they raised two years ago with the Court's prior consideration of the motion. And this helps demonstrate that the findings and conclusions you made in 2016 continue to support the issuance of a permanent injunction today.

Now, let me turn to the second preliminary matter I'd like to discuss, which is the most curious aspect of Rimini's opposition brief.

They say that if the Ninth Circuit did not explicitly reach the merits of an issue, then you can't enjoin them on that. They don't say why they think that. They don't say that there's a case that says that. They don't say there's a statute that says that or any kind of doctrine or rule.

Their brief simply assumes that unless the Ninth Circuit reached a certain issue, you are powerless to

enjoin them for that particular conduct.

But we never hear where that assumption comes from. The brief is just written on that premise. Rimini is incorrect about that. Under both the rule of mandate and the law of the case, their argument is wrong.

The rule of mandate provides, as the Ninth Circuit explained in *United States v. Thrasher*, that a district court cannot revisit its already final determinations unless the mandate allowed it.

And we quoted for Your Honor the discussion of the law of the case and the Ninth Circuit's decision in *United States v. Lummi Indian Tribe*:

> "A Court is generally precluded from reconsidering an issue previously decided by the same court, or a higher court in the identical case."

And here the Court issued two orders on summary judgment concerning PeopleSoft and Database infringement in construing licenses with respect to JD Edwards and Siebel.

The Court then gave instructions to the jury, and the jury heard the evidence and ruled in favor of Oracle on all 93 of Oracle's copyright claims.

The copyright claims were adjudicated to finality in this court. There was nothing left. There was nothing unresolved. Oracle prevailed entirely on its 93

copyright claims.

And the Ninth Circuit's verdict on appeal was to affirm the copyright verdict. They did not reverse any part of it. They did not criticize you. They did not criticize any of the jury's findings. They didn't say anything about the copyright verdict was unclear. They simply, flat out affirmed.

In that situation, under the rule of mandate and the law of the case, you should not go back and revisit your prior orders or the jury's determinations. Those are still binding. Those determinations are still valid. There's no basis to narrow the scope of Rimini's copyright infringement liability. Instead, you should issue a permanent injunction that enjoins the full scope of Rimini's infringing conduct that both you and the jury have already adjudicated.

There's a particularly powerful reason why you should do this and why your injunction should reach matters that were not reached by the Ninth Circuit in their opinion on the merits. And one of them is that Rimini made strategic decisions on appeal and some unstrategic decisions about issues that it wanted to challenge.

Rimini didn't appeal everything that you found on summary judgment, and they didn't appeal everything the jury found.

To take a couple of examples, the jury found liability for the creation and distribution of derivative works.

You may recall at the 2015 trial Oracle put on Professor Randall Davis who testified how Rimini created derivative works in the form of patches and updates and fixes and then distributed them to hundreds of its customers, and he had charts and graphs showing the process by which Rimini created these derivative works and the number of different customers that received them.

And the next witness at trial was Seth Ravin, Rimini's CEO. And he was confronted with these exhibits from Professor Davis' testimony, and he agreed, he said that sounded right to him.

And when asked by his own counsel about the preparation of these derivative works and their distribution to customers, he said that Rimini did it, quote, all the time. So the jury found -- had that evidence in front of them, and they ruled in favor of Oracle on the merits.

On appeal, Rimini elected not to challenge the findings about derivative works and distribution.

Now, I understand that there may have been a reason why Rimini didn't want to do that and why they limited their appeal to the reproduction rights. If the

copies of the software, the development environment sitting on Rimini's servers were infringing, then obviously the derivative works that were prepared with them and were distributed from them were also infringing. So there was no upside to Rimini from separately challenging the derivative works and distributor issues on appeal. They didn't touch those issues on appeal.

But a necessary consequence of that is that the Ninth Circuit, therefore, didn't reach it. When an appellant who has lost in the court below doesn't raise an issue on appeal, there's no reason for the court of appeal to do that, unless it were jurisdictional, which here it wasn't.

And yet now what do we see when Oracle has renewed its motion for a preliminary injunction? Rimini is telling you that you shouldn't enjoin the preparation of derivative works or the distribution of them because, quote, the Ninth Circuit didn't reach the issue. But they didn't reach the issue because Rimini didn't raise it.

The situation is even more extreme with respect to Oracle Database. Oracle moved for summary judgment on every single copy of Oracle Database that Rimini had in its possession or that it used to provide for support.

We said that none of them were authorized by the developer license, which doesn't allow the commercialized

use of Database, and that Rimini had no ability to assert its own customers licenses. And you ruled in favor of Oracle on all of the copies of Oracle Database.

And the Ninth Circuit said that Rimini waived its appeal. They said that Rimini failed to challenge your order on summary judgment, and they waived it. The Ninth Circuit used the word "waived."

And now look what Rimini's doing. They're coming back before you in their opposition and brief, and they're saying you can't enjoin them with respect to Oracle Database because the Ninth Circuit didn't reach the merits of the issue.

But that's crazy. It wasn't -- the Ninth Circuit said that Rimini had waived the demerits of the issue.

Take a defendant who is convicted of murder and then files his notice of appeal several days late. I bet the court of appeals is going to find that he probably waived his right to appeal. That doesn't mean he's not a murderer anymore. It means he has waived his ability to challenge that determination. Yet, that is literally the argument that Rimini is saying.

They lost on summary judgment with respect to Database. The Ninth Circuit said they had waived their ability to challenge that on appeal. And before you they

say, aha, we're in the clear, you can't enjoin us.

No, that's not right. They're not in the clear. They're absolutely not in the clear when they have waived their right to appeal and they have lost across the board before this court on Oracle Database. So you should absolutely enjoin them with respect to Oracle Database because they waived that on appeal.

And there were other issues that Rimini chose strategically or unstrategically not to raise on appeal. The Ninth Circuit reminded us all of one of them in footnote 2 where they pointed out that your jury instructions very clearly distinguished between software and documentation. And the Ninth Circuit noticed that there was no appeal by Rimini with respect to any of the documentation.

Does that mean you shouldn't enjoin them with respect to documentation? No. They lost in the court below, and they chose not to raise that issue on appeal.

For some issues, where Rimini did appeal, there were multiple grounds on which this Court found Rimini's conduct to be infringing and the Ninth Circuit didn't need to reach all of them. For example, let's talk about the PeopleSoft environments, because Rimini makes such a big deal about this in their opposition brief.

On summary judgment, in February 2014, you found

that the PeopleSoft environments were infringing for two reasons.

First, you found that the license had a facilities restriction, and so because these environments were not on the customers' facilities, they infringed for that reason.

Second, you found that the licenses had a restriction that the software could only be used for the internal data processing operations of each particular client. By contrast Rimini cross-used. They cross-used a clone, one environment for other clients, they cross-used to have one environment to create derivative works that they would send to a large number of them. So there were two grounds for that.

Then at trial Oracle introduced a third ground, the derivative works issue that Rimini created and prepared, patches, fixes, updates from these environments and then distributed them.

On appeal Rimini challenged the facilities restriction and the cross-use restriction, but not the derivative works and distribution.

And the Ninth Circuit resolved the PeopleSoft environments on the facilities restriction. They said it -- yep, it sure looks like these software environments can only be at the customers' facilities, and they weren't.

They were on Rimini's facilities.

And the Ninth Circuit then dropped a footnote and said because that issue was dispositive, because that meant that all of those environments were infringing, they didn't need to reach the separate issue of cross-use.

That doesn't mean that they reversed you. It means that the court of appeals -- there were two grounds on which you held those environments to the unlawful, and they only needed one to affirm.

That's a common thing for a court of appeals to do. There might be several things in support of a district court's decision. They don't need to decide all of them.

Fundamentally, the way Rimini reads the Ninth Circuit's decision is that for every decision that you made, for every finding that the jury made, Rimini is saying that if the Ninth Circuit didn't reach that particular issue, they secretly reversed.

Rimini would have you believe that large portions of the Ninth Circuit's opinion are written in invisible ink that only Rimini can see, that they constantly went around reversing every single part of your and the jury's copyright infringement determinations that they did not explicitly reach.

But they didn't. That's not there. There isn't the invisible ink there with the secret reversals. The

verdict from the Ninth Circuit was affirmed, affirmed without qualification.

Rimini's argument that they narrowed the finding of copyright infringement liability, that they somehow reversed or limited, none of that is what the word "affirmed" means.

Under both the rule of mandate and the law of the case, your prior findings, the jury's prior findings on the full scope of Rimini's copyright infringement remain intact and should not be reconsidered, and you should issue a permanent injunction that goes to the full scope of the adjudicated liability that Rimini has for copyright infringement.

I'd like to turn now to the *eBay* factors and focus on the first two, which is irreparable injury and the remedies of law being inadequate.

There were several types of irreparable injury that you found in your 2016 order. There was good reason to find them, and they continue to be correct findings today.

The first was direct competition and the loss of market share. And we cited for the Court and cited again, and you quoted cases such as the Federal Circuit's decision in *Presidio Components* where they said:

"Direct competition in the same market is

certainly one factor suggesting strongly the potential for irreparable harm."

And then in another case, *Douglas Dynamics*, this was in the patent context, they said:

"Where two companies are in competition against one another, the patentee suffers the harm, often irreparable, of being forced to compete against products that incorporate and infringe its own patented inventions."

And, Your Honor, that is what is happening here.

Oracle has invested literally billions of dollars in its valuable software products, and Oracle uses those to compete in the market, and it finds itself in the untenable situation where Rimini takes those inventions, products that Oracle developed, and uses them to compete against Oracle.

Rimini didn't have to incur any of the development costs to make its own software because it doesn't have a computing software product. It uses the environments of the Oracle software environments to develop infringing derivative works, the patches that fixes them, the updates to provide to its customers.

Rimini can do that at 50 percent off because it doesn't spend billions of dollars to create its own software. It uses Oracle software against Oracle in an

infringing manner. This is the direct competition that you recognized as being an irreparable harm.

And Mr. Ravin was open about this on the witness stand. He said absolutely it was Rimini's business plan to avoid incurring the costs of developing a competing product and, instead, to make use of Oracle's products so they could develop patches and fixes on that to have a scaleable model, a more efficient model. He didn't use the word "infringing," but that's what that meant, to take Oracle's products in direct competition and use infringement so they could sell it at a cut-rate cost against Oracle.

And, as noted, you previously found this to be irreparable harm.

Importantly, this is copyright harm. It's not computer access harm. It is copyright harm directly relevant to the remand in your consideration of an injunction under Section 502.

The unlawful downloading that Oracle sued about in *Rimini I* involved tools that Rimini employee, Douglas Barren, developed for Rimini Street to use. Rimini stopped using those tools in January of 2009, but the infringement continued.

All the new customers they gained in 2009 in 2010, in 2011, and all the years since then, that's copyright harm that is being done to Oracle with direct

competition.

And the Court found in 2016 that Rimini would not have achieved the market share that it had without this use of infringement. That's a direct link between the copyright infringement and the irreparable harm, the loss of market share and direct competition to Oracle.

And now why is this harm irreparable? Why are remedies at law inadequate? You said it yourself in 2016. Because loss of market share is difficult to quantify. Because every day Oracle is going out there competing in the situation of competing against its own inventions being used against itself by an infringer.

There's also a second type of irreparable harm that the Court found, and that's harm to goodwill and to business reputation.

Courts in the Ninth Circuit have repeatedly held that this type of harm is sufficient to justify a permanent injunction.

We've cited for Your Honor the Ninth Circuit's decisions in *Apple v. Psystar* and *Rent-A-Center* on this point. And, again, the evidence shows that Rimini's infringement did injure and continues to injure Oracle's reputation and goodwill.

Oracle's CEO, Safra Catz, testified that the harms to Oracle's relationships that come from Rimini

telling everybody that Oracle is ripping them off. Because that's what Rimini is doing, when they go out there with their 50 percent off, because they didn't have to spend any money to write any of their software, they convey the impression that Oracle is overcharging.

And they're proud of that. This is their marketing message. They go out and tell everybody that Oracle is overcharging them. And this breaks the bonds between Oracle and its customers. This is a harm to Oracle's reputation and goodwill.

There are other harms beyond that, that Ms. Catz and Edward Screven testified to at trial, that many customers believe Rimini's promises about its support being adequate, and they find out only too late that without Oracle's upgrades their systems are frozen and out of date, and they can blame Oracle for that because Oracle was the developer of the software.

This type of harm to goodwill is also irreparable. It's very difficult to quantify, and it's hard to compensate exactly the effects on Oracle from all of this. And the *eBay* and *Apple* cases endorse this view and say because this harm to goodwill and business reputation's difficult to quantify, it again is a further reason for a permanent injunction.

Now, Rimini constantly argues that the jury's

rejection of lost profits as a measure of damages means there was no harm to Oracle. But that's incorrect.

The jury was given different measure of ways to measure damages and was asked to choose the one they thought was most appropriate. They chose a fair market value and went with that one.

As the Court previously acknowledged, they may have chosen not to award lost profits simply due to the difficulty in ability to compute the lost profits. And the case law has recognized that sometimes lost profits can be difficult to compute, and that's a further reason why an injunction is important to protect the harm to goodwill and the harm to business competition.

This is also why the *Rimini II* lawsuit is no answer to Oracle's products. Rimini says in their opposition brief that you don't need to issue a permanent injunction because there's a second lawsuit between the parties, and they say any problems can be dealt with in damages in that case. They say Oracle hasn't explained why it needs a permanent injunction in the first case when we have the second one going on.

But we have explained, and there are several reasons, and harm to goodwill and business reputation is one of them. Those are extremely difficult to quantify and to recover in any lawsuit. These harms are ongoing.

Rimini's advertising campaign, where they say they're 50 percent off, means that Oracle is overcharging, that reaches not just customers that end up going to Rimini, it reaches a large segment of Oracle's customer base, including customers that end up not going to Rimini, including customers when they're trying to make the initial decision do they license Oracle's software or do they license a competitors's software, such as SAP or Salesforce or Workday.

Rimini's broad message that Oracle is ripping off its customers, which Rimini delivers because through infringement it can offer 50 percent off, this hits Oracle's customer base as a whole and customer -- potential customers.

Even if Oracle recovers every single dollar in lost profits in the *Rimini II* action, it will never have any recovery for that harm to its business reputation and goodwill due to Rimini's broad message out to Oracle's customer base and potential customer base. And that's one reason why an injunction is necessary and the second lawsuit will not provide a full recovery for Oracle.

There's also another type of irreparable harm for which there's no remedy at law, and that's Oracle's right to exclude. And this was something I discussed in 2016 about the *eBay* case where Chief Justice Roberts had a

concurring opinion, where he acknowledged that, yes, it's true, courts apply the traditional four factors in equity to decide whether to issue an injunction.

And, yet, in case after case patent holders routinely win the injunctions. And he was trying to explain why is that? Is there some kind of contradiction in there?

And he said, no, there's no contradiction because at bottom a patent is a right to exclude, and fundamentally damages can never fully make up for an infringement on the right to exclude.

A copyright is similar to a patent in that it is also a right to exclude. And here, without an injunction, Oracle suffers irreparable harm.

In this case, Oracle has been forced against its will to become an involuntary licensor of its software to Rimini Street, a company with which it wanted never to do any business. The jury awarded a fair market value of use to Oracle as a measure of damages approximating the value to use of Rimini Street, effectively, you know, a hypothetical license amount.

But Oracle didn't want to license its software to Rimini at any amount of money. What Oracle wants is to enforce its right to exclude. And that's why we're here before you today, saying just paying Oracle what amounts to

rent for using its property, a fair market value for using it for a period of time isn't sufficient, because Oracle has a right to exclude, to keep Rimini away from its copyrights.

Sometimes I think that when we're talking about intellectual property, analogies to physical property can be helpful to illustrate a principle. And this is one of those times.

Imagine that you're a property owner. You spent a lot of money to buy some land, and you want to use this land to run your business. So you put up a shop on your land. You have a business, you're working hard, you're getting customers, you're making a profit, and then one day you notice that your competitor has built their shop on your land as well.

They didn't go out, they didn't buy their own land, they put up their shop on your land, and they're out competing with you.

So you sue them for trespass, as any reasonable person would. You win at trial, and the jury awards you damages, say reasonable value of use, amounting basically to rent for them being on your land.

Then you move for a permanent injunction, and the competitor comes back and says, Oh, you don't need an injunction, you can just sue us again in the second case,

and then down the road you might get some more dollars for a continued use of your land without your permission.

Your Honor, in that situation I hope you would have some sympathy for the property owner who said, Hey, wait a second, I never wanted to be a landlord. I didn't want to rent out my property, especially to my biggest competitor. This is -- I didn't want to be in that business, I don't want to have anything to do with them at all.

That's the position in which Oracle finds itself as well. It never wanted to be licensing its software to Rimini, it wants Rimini not to use that at all.

The only way to enforce Oracle's right to exclude is with a permanent injunction. And that's another reason why the *Rimini II* case cannot be a remedy at law for Oracle because that would just -- that could be more damages, yes, Oracle could potentially recover a very large amount of damages, and is, in fact, seeking a large amount of damages, but fundamentally Rimini's conduct would still be continuing.

And the only way to enforce Oracle's right to exclude is with an injunction. Otherwise Rimini will continue trespassing on Oracle's intellectual property.

The remaining *eBay* factors are straightforward. The balance of hardships and the public policy again tilt

in Oracle's favor as you determined in 2016.

On both of those issues, it's important to note that Oracle drafted a proposed order that tracks exactly the liability determinations that you made on summary judgment and the jury instructions that you gave to the jury going into the trial. We mirrored that exactly to make sure that this injunction tracks the full scope of the liability findings and doesn't go any further.

You may recall that the prior injunction had two parts. The first part was about copyright under Section 502 of the Copyright Act, and the second part was under the California computer access statute. They were completely distinct parts of the injunction. We didn't mix and mingle. We didn't match up copyright and the California access. We had them as separate.

And the Ninth Circuit saw that and they noticed it and they pointed that out. They said, yes, it looks like that computer access injunction was totally distinct from the copyright injunction.

So what we did, Your Honor, when we filed this renewed motion, is we just took out all of the computer data access and fraud and just went with the straightforward copyright injunction. It tracks the findings that you made before exactly, it tracks your liability findings and the jury instructions.

And because of that, the balance of hardships and public policy weigh strongly in favor of Oracle because you would only be enjoining conduct that has already been adjudicated to having been found unlawful and there's no legitimate reason for that conduct to continue.

Now, Rimini has a bunch of other arguments that they made again in 2016 and that you rejected. But for the sake of completeness I'll tic through them.

One is their voluntary cessation argument. They say that after you ruled against them on their February 2014 summary judgment order they began to change their ways.

Now, as you know, Your Honor, we don't believe for a minute that they stopped infringing, and that's part of the reason why we have the second case.

But for purposes of today, we're not asking you to decide *Rimini II*, we're asking you to look at cases like *MGM v. Grokster*, as you did before, that say that, Wait, if you only cease the infringing conduct after a court has issued a summary judgment order against you, that doesn't count.

That's not good enough for voluntary cessation because they did it only under judicial compulsion. And so -- and presumably if there were no injunction and no further judicial compulsion, there's too great a risk that

the infringement could resume.

And we cited other cases, including the Ninth Circuit's decision in *SEC v. Koracorp* that say, again, that if they stop only after they've been caught, then that doesn't count as a valuable voluntary cessation.

You should also bear in mind that after you issued the last injunction in 2016, when Rimini claimed it had stopped its infringing ways, what did they do? They filed an emergency motion. They said that your injunction would cause -- I'm going to quote their words, untold irreversible consequences to Rimini Street if that injunction were allowed to go into effect.

They submitted a declaration under penalty of perjury saying that injunction would require additional changes to their processes.

Well, that injunction just tracked the scope of the infringing conduct. That meant they hadn't really ceased their infringing ways.

And, again, Rimini raises the innocent infringer argument that they raised in 2016 and that you dealt with in your prior order. That just has nothing to do with the Court's ability to issue an injunction. Section 502(a) of the Copyright Act authorizes you to issue a permanent injunction. Congress said absolutely nothing about requiring the infringement to be intentional or willful or

anything like that. An innocent infringer can be enjoined like anyone else.

We've cited cases for Your Honor where courts have done that. Rimini has yet to come up with a case saying that there's some kind of unstated requirement in the statute that innocent infringers can't be enjoined. And I do think as we consider that innocent infringer argument, we all need to use common sense and realize what an injunction is. An injunction enjoins conduct in the future, conduct that would happen after you issue injunction, not conduct in the past.

The innocent infringer determination was based on the state of mind the jury thought Rimini had with respect to the infringement before the verdict came down.

But then the verdict came down, and the jury found that they were liable, and the Ninth Circuit affirmed that judgment of liability.

So if you issue an injunction at this point, you're not enjoining innocent infringement, your enjoining infringement that cannot in any way, shape, or form be considered innocent.

Lastly, with respect to the scope of the injunction, all of the arguments Rimini raises now are just repeats from 2016, with one exception, and that's the exception, the argument that I began with, where they say

that you can't enjoin something unless the Ninth Circuit specifically reached the merits of that issue.

And that's just flat-out wrong. As I said, there were a number of reasons Ninth Circuit didn't reach every issue. One of the big reasons is that Rimini waived some of those arguments and didn't raise them on appeal, and others the court of appeal didn't need to.

But under both the rule of mandate and the law of the case, there's no call for you to go back and narrow the scope of yours and the jury liability findings. All of the *eBay* factors favor the grant of a permanent injunction, and we ask that the Court grant one. Thank you.

THE COURT: Thank you, Mr. Hixson.

MR. PERRY: May I approach, Your Honor?

THE COURT: You may.

MR. PERRY: Mark Perry for Rimini Street, Your Honor. I've handed up to the bench and to opposing counsel a booklet with some slides that I hope will illustrate the core of the parties' dispute. And that's really what I'd like to focus on today.

Oracle stands here and asks this Court to enter the identical injunction that one panel of the Ninth Circuit has already stayed and another panel of the Ninth Circuit vacated.

Oracle admits that it advances the same

arguments that it did in 2016 because in Oracle's view there has been no change in law, no change in facts, and accordingly the merits of its motion have not changed. And that's a direct quote from its motion at page 12.

What's changed, Your Honor, is we have a Ninth Circuit opinion. We had an appeal in which these issues were hotly contested by the parties, and we didn't have that the last time around. And our summation, respectfully, is that the entry of Oracle's proposed injunction is foreclosed by the Ninth Circuit's opinion. And I'd like to focus at least the first part of my remarks on that.

The parties' dispute really boils down to what is the effect of that decision. You just heard Mr. Hixson describe in his second preliminary statement that everything this Court and the jury did stands and was affirmed by the Ninth Circuit. That's Oracle's position.

Rimini's position is what the Ninth Circuit, when confronted with express arguments, where it ruled on one and not the other, the second is not preclusive, it doesn't bind this Court, doesn't bind the parties.

And Oracle called that -- Mr. Hixson just called that the most curious aspect of our argument. He said that has no authority and no basis. And I think this really is the Court -- this Court will have to decide this two

competing positions.

Because if Oracle's right, they're further down the road; but if we're right, they lose entirely. You can't issue the injunction if they're not right on this point.

And let me explain to the Court why they're not right. And I'd like to use the PeopleSoft licenses as an example.

As the Court will recall, there were two bases for PeopleSoft liability: local hosting and cross-use. Both were appealed to the Ninth Circuit. There's no waiver issue here. Both were hotly disputed in the Ninth Circuit. And I'll come back to that point.

But in the Ninth Circuit's decision, the Ninth Circuit ruled only on local hosting. The Court sustained the liability finding as to PeopleSoft as to local hosting, and it put in a footnote, footnote 6, and I've put it up on slide 3 here because it's very important:

> "Because we address the question of infringement as to PeopleSoft on the narrow ground of local hosting, we do not decide whether direct use or cross-use was permitted by the PeopleSoft license."

"We do not decide."

So what is the consequence of that, Your Honor?

In its reply brief, Your Honor, Oracle says, and you heard Mr. Hixson say it again today, that the law of the case and the law of the -- and the mandate rule apply here.

That's wrong. That's wrong as a matter of law. And since we didn't get a surreply, I need to explain why the first time. Frankly, this is federal courts 101.

Your Honor, when a judgment goes up on appeal, it's the judgment of the highest court that's controlling, not the summary judgment, not the verdict, not the post-trial judgments in the trial court, but the appellate judgment.

And the scope of the appellate judgment and mandate are defined by the Court's opinion if it chooses to write one. This is the Black Letter Law.

I've put on Restatement of Judgments, what happens if two grounds for a judgment are presented to the court of appeals and the court resolves one but refuses to decide the other?

And the restatement is very clear.

"If the appellate court upholds one of the determinations as sufficient and refuses to consider whether or not the other is sufficient and accordingly affirms the judgment, the judgment is conclusive as to the first determination," the one decided by the court of

appeals, it is not conclusive as to the second determination. That is the law.

The federal appellate courts uniformly follow this approach.

I've put up on the next slide a quote from a representative Ninth Circuit case:

"It is a well-established principle of federal law that if an appellate court considers only one of a lower court's alternative bases for its holding, affirming the judgment without reaching the alternative bases, only the basis that is actually considered can have any preclusive effect in subsequent litigation."

And I put the citation on here. And because this issue came up for the first time in Oracle's reply brief, I've put, Your Honor, in the packet at slide -- or in tab 5, just a few respective case citations from lots of courts of appeals for this same proposition, which I think is undisputed and frankly indisputable.

Your Honor, the Ninth Circuit considered local hosting sufficient to sustain the liability as to PeopleSoft. The Ninth Circuit did not decide cross-use. Therefore, the parties and the Court are bound as to local hosting but are not bound as to cross-use.

That means it can be litigated again in *Rimini*

II, and will be, and cannot be the subject for an injunction now after the Ninth Circuit's ruling. The equitable power of this Court is limited to the acts actually adjudicated as infringing.

Oracle admits this, Your Honor, in their motion at page 17.

"Oracle seeks only to enjoin acts that have already been determined to be unlawful."

And as to PeopleSoft the only act determined to be unlawful by the Ninth Circuit was local hosting, and the Court expressly did not decide whether cross-use was unlawful.

The same point carries through, Your Honor, to JD Edwards and Siebel, the other two product lines that have this issue.

Here we have something of the converse of the PeopleSoft situation. The court -- the Ninth Circuit ruled that there are no site restrictions in those two licenses. There's no local hosting problems at all, even though Oracle's proposed injunction contains a local hosting restriction that has no basis in the license, the judgment, or the appellate mandate.

And with respect to cross-use, the Ninth Circuit was very circumscribed. The Ninth Circuit ruled that a very specific form of cross-use, the use of one client's

software to create a development environment for a future customer was an infringing act.

Court of Appeals stressed, and we put this quote up on the next slide:

> "Rimini created development environments for future customers using the license of an existing customer on the basis that future customers presumably would have licenses that would permit them to hire Rimini to create development environments."

That was the context of the Ninth Circuit's discussion of cross-use for JD Edwards and Siebel.

Now, in its reply brief, Your Honor, at page 3, Oracle says that we, Rimini, ignore that the Ninth Circuit broadly defined cross-use to include both current customers and future customers.

Your Honor, it's absolutely true at page 956 of the Court's -- Ninth Circuit's opinion in the background section the Court has a sentence that's prefaced, generally speaking, where it describes what cross-use may be broadly. But then in the analysis portion of its discussion, on page 957 of the opinion, where it actually applies cross-use limitations to the JD Edwards and Siebel products, it is limited to future customer cross-use.

And the Ninth Circuit itself removed any doubt

on this, Your Honor, in the very next portion of its opinion, which addressed copyright misuse, and the Court said, and I'm quoting from page 958, and this is at the bottom of slide 8 -- 6, excuse me, quote:

> "The only remaining question is whether it would be copyright misuse to forbid Rimini from creating environments for licensees before they have become customers."

Future customer cross-use. And the Court said that is not copyright misuse. The Court did not address at all whether current customer cross-use would be copyright misuse because it didn't decide anything as to current customer cross-use.

The only scope of the Ninth Circuit's opinion was as to future customers.

And if we could put up slide 7, there's a reason for this, Your Honor. A really good reason.

The Ninth Circuit had some real skepticism about whether cross-use is infringing or unlawful at all. Rimini came up to the Ninth Circuit and said cross-use is not copyright infringement. And it's not, Your Honor. Copyright Act deals with copying. Use is dealt with by licenses. This is not an infringement problem, but a license problem.

And the Ninth Circuit recognized this. And in

the questioning of Oracle's counsel, Judge Graber -- and there's a long quote up there on the screen and in the booklet, and the gist of it is if Rimini had the right to make 10 copies for 10 clients and instead they made 10 copies for one client and then distributed it 10 times, why does that make any difference?

And Oracle's response, Your Honor -- and this is in the transcript, which we've also put in the booklet and we urge the Court to read, of the Ninth Circuit's argument, because Oracle made a number of concessions, that it would violate the terms of the license. Not that it was copyright infringement. Because it's not copyright infringement.

If the license says you can only copy the software while you're wearing a green shirt and you copy the software wearing a red shirt, you have not committed copyright infringement. You may have breached the license, but you have not committed copyright infringement. And that's a core dispute.

We argued on appeal, Your Honor, that -- and there's a distinction, by the way, that's in the law between copyright license covenants and conditions. And there's a lot of cases on this. And we argued on appeal that the whole cross-use kerfuffle is really properly put under the context of conditions. It is a subject of the

license and is only dealt with by breach of contract law and not by copyright law.

Oracle urged the Ninth Circuit not to reach that issue. It said it hadn't been adequately developed.

And the Ninth Circuit agreed with Oracle and said we're not going to decide that question whether cross-use is contractual rather than a copyright issue because it's not properly before us. If it's not properly before them, then it is definitely before this Court in *Rimini II*.

The parties will vigorously debate this. The experts will deal with this. The briefing will deal with this. This is a critical issue in the second case, Your Honor, whether Oracle has any basis to restrict the use to which the copies are made because, as I will describe in a moment, the Ninth Circuit also resoundingly sustained Rimini's right to make the copies.

Oracle says in its reply brief at page 3 that any act of cross-use is copyright infringement. That is false. That is not true. And it is certainly not supported by the Ninth Circuit's opinion. They tried to sell that in the Ninth Circuit, and the Night Circuit wasn't buying it.

In fact, Your Honor, at the Ninth Circuit an extraordinary thing happened. If we can skip forward to

slide 9. Oracle's lawyer in the Ninth Circuit conceded that Rimini can make copies to support a licensed user.

Now, that may seem obvious. It's been our position all along. But Oracle has never admitted that until the Ninth Circuit oral argument. It was the first time in the long history of this litigation that Oracle has conceded that Rimini can use the software because the licenses after all, say that the licensee, the customer, can hire a third-party vendor to perform support.

And what the Ninth Circuit recognized is several things. First, and this is all from the Court's opinion at page 951:

> "At all relevant times Rimini provided third-party support for Oracle's enterprise software in lawful competition with Oracle's direct maintenance services."

So the provision of support itself is lawful. We know that from the Ninth Circuit.

Second, the Ninth Circuit told us, again at page 952:

> "Creating these software updates inherently requires copying of Oracle's copyrighted software which, unless allowed by license, would be copyright infringement.

We're all in agreement on that too.

But the important part for now is copying is required to perform the support system.

And then at page 958 the Ninth Circuit expressly ruled that the licenses:

> "Would not preclude Rimini from creating development environments for a licensee for various purposes after that licensee has become a customer of Rimini."

In other words, carving out future customer cross-use, the only subject it actually dealt with, the Ninth Circuit expressly said that the licenses permit Rimini from copying the software to create development environments to provide support to Rimini's customers who are also Oracle licensees.

That's what the Ninth Circuit said in this case, Your Honor. That is very different than the posture in which Oracle came to this Court in 2016.

Two years ago, Mr. Hixson stood at this lectern and told this Court, quote, and this is in the transcript of page 70 from last time:

> "Oracle wants to stop Rimini from using its software."

That's what the injunction they have proposed is designed to do.

They don't get to stop Rimini from using the

software. The licenses allow the customers to use the software, including for third-party support, and that was sustained by the Ninth Circuit. The only question is whether there are particular acts that need further judicial adjustment, and we submit no.

Because this whole case, Your Honor, is a license dispute. This whole case is about the scope of these licenses and whether or not after making the copies, which are permitted by the licenses, the manner in which Rimini uses them is within or without the various conditions imposed by the licenses.

And Oracle at the Ninth Circuit, and this is the second quote on slide 9, he said this, and I'm quoting:

> "To the extent there are disputes about that, I mean, Gibson Dunn is involved in *Rimini II* at a stage they weren't involved in *Rimini I*, and those issues can be resolved in *Rimini II*.

That's what Oracle told the Ninth Circuit, to avoid deciding whether cross-use is copyright infringement at all, to avoid deciding whether current customer cross-use is even in violation of the contracts, Oracle's lawyer, Paul Clement, stood up in the Ninth Circuit and said those can be decided in the second case.

And now Mr. Hixson comes to this Court and says, Don't wait for the second case, decide them now.

There's a fundamental inconsistency in those positions, Your Honor, and we submit that given the representation that Oracle made to the Ninth Circuit was clearly relied on by the Ninth Circuit, which then issued a very narrow ruling not reaching cross-use, this Court simply does not have the power to enjoin cross-use because it hasn't been resolved.

If we can go to slide 10 please. There are four products at issue. And I put up here just a simple chart, four-column chart, Your Honor.

The court of appeals had one basis for ruling on each one of them.

Local hosting for PeopleSoft; future customer cross-use for JD Edwards; future customer cross-use for Siebel; and waiver for Database.

Let me pause on Database.

The holding was not, as Mr. Hixson said this afternoon, that Rimini had waived its challenge to Database licenses. It is rather, as the Court undoubtedly will recall, there are two sets of Database licenses: the developer licenses and the customer licenses called OLSA's.

This Court ruled that the Rimini services were not permitted under the developer license and that Rimini could not invoke the customer licenses because none of the development environments had actually been obtained at the

summary judgment stage from customers.

We didn't challenge that ruling on appeal, and in that sense it is waived. No court, this Court or the Ninth Circuit, has ever decided whether a development environment obtained through a customer license can be used for this purpose. And again that's a question for *Rimini II*. It simply was never presented.

Rimini I dealt with a developer license. We have -- we'll live with that. I mean, we agree, of course, the Ninth Circuit decides certain things. That's fine. But the Ninth Circuit didn't decide anything about the customer licenses for the simple reason that this Court had not either.

The preclusive effect to the Ninth Circuit's ruling though, Your Honor, extends no further than these four points. That means the other issues remain open for litigation in *Rimini II*. And it means those issues cannot be enjoined in *Rimini I*.

And it bears remembering in this context, Your Honor, that Rimini was willing, ready, able to have everything decided in one lawsuit. We asked the Court to put all the issues together and decide them at once, and Oracle refused. Oracle said, "No, let's keep the two cases apart, let's have the past practices in case *I* and the current practices in case *II*, and this case agreed with

Oracle.

We're not challenging that. But the consequence of that is we have the second case, and it's going to have a lot of things that have to be resolved in it as the Court is aware.

This exercise, the permanent injunction, is not the place to prejudge those issues.

Your Honor, I'd like to put this in broader perspective. And with apologies for my artistic skills, I've drawn this graph to describe both this case and, frankly, the ordinary course of commercial litigation.

You know, Oracle came to this Court in *Rimini I* with a complaint that had a dozen causes of action against two defendants, Rimini Street and Mr. Ravin, that sought all kinds of relief on all kinds of theories. And over years of litigation the case was whittled down. And that's what happens to cases, right?

At summary judgment the Court ruled on some things. Oracle withdrew some things. The jury rejected some things and agreed with some other things. And the Ninth Circuit, as we've just spent several minutes discussing, agreed with even fewer things, so that at the end of the process or the bottom of the funnel we have a much narrower case than we started out with.

As we stand here today, Your Honor, we're at the

pointy end of the pyramid. We're at the narrowest, the apex, the smallest part of the case, and the Court's injunctive power, equitable power, to the extent it needs to be or ought to be exercised at all is limited there.

Mr. Hixson wants to take you back to the base, the broad base, the take-everything base. Under his view Rimini's very existence in the marketplace is an affront to Oracle, a challenge to its customers, a threat to its property, and an exercise of this Court's equitable power. He wants the Court to enjoin Rimini's existence. He wants you to stop Rimini from accessing Oracle's copyrights.

That ship has sailed. The Ninth Circuit said that competition is lawful, access is required, copying is required, and it's permitted by the licenses.

The details can be sorted out in the second case. That's what we know from the appeal.

And the injunction -- there's none necessary, but even if it were -- we're not even talking about the right discussion. We ought to be at that narrow very end of the pyramid.

And this feeds directly to the *eBay* factors, Your Honor. And I'm only going to talk about one, because one is absolutely dispositive here, and that's irreparable injury.

You know, the first time around, Oracle stood up

here, Mr. Hixson stood at this lectern and said you should enjoin Rimini because they have callous disregard, wilful disregard for property rights, and we know that both from the copyright verdict and from the hacking claims.

And this Court agreed with Oracle. And the Court wrote in its order that the improper access and downloading of data from the website caused the irreparable harm, it was a factor in the irreparable harm.

The Ninth Circuit, we know, reversed the hacking judgment, reversed the hacking injunction entirely, and then vacated the copyright injunction. And the Court of Appeals was very clear on why it did that.

The Court said, and I put up some quotes on slide 13, the district court assessed the four factors by referring to both the copyright and the hacking claims without considering separately the propriety of issuing an injunction as to the copyright claims alone.

And we know which factor was important to the Ninth Circuit because they told us that too.

For example, the Court concluded that Rimini's violations of state computer access statutes contributed to an irreparable injury to Oracle's business reputation and goodwill.

So we know that the Court of Appeals has told this Court we need to reevaluate irreparable injury.

What does Oracle say? Oracle says, and this is a direct quote from its motion at page 13, that it, quote, never argued that the hacking claim supported issuance of a copyright injunction. It never argued that.

Well, that's just false, Your Honor. It argued that to this Court, and this Court agreed with Oracle. It argued it to the Ninth Circuit.

I put up a quote on the slide just so you see:

> "Much of Rimini's business and the harms Rimini caused Oracle, depended on the unauthorized downloading that formed the basis of the computer abuse verdicts."

I mean, yes, they did argue it. And the court of appeals was aware they argued it. The court reversed the hacking injunction and vacated the copyright injunction to do that.

Now, why did Oracle argue that? Well, again, it needed some intentional conduct. It was faced with this innocent infringement verdict. It hates that. We know that.

Mr. Clement in the appellate court called it the most perplexing part of this case is the jury's innocent infringement verdict. We know the jury found that Rimini had no reason to know that its actions were unlawful. Because Rimini simply read the licenses differently than

this Court did, Your Honor. That's the basis of this whole dispute. Rimini read the licenses differently than the Court did, and the jury said that was innocent.

Oracle -- we've now briefed this issue six times in two courts. Oracle can't find a case, since the republic was established, in which any court anywhere has imposed a permanent injunction on an adjudicated innocent infringer.

Mr. Hixson's response is, Well, Rimini can't find a case where it didn't happen.

Well, there's two problems with that, Your Honor. Every case it didn't happen because there's no such case, right? And it's Oracle's burden. The proponent of an injunction has to prove that it is.

Does this Court really want to be the first case in history to impose an injunction on an innocent infringer? We don't think so. And we don't think it's warranted.

And it's not just the innocence finding, Your Honor. We could even set that to the side. I think the innocence finding is telling about how the jury viewed Rimini's conduct.

But let's really just look at Oracle's plain-old failure of proof. To set the table, let's remember what Oracle's evidence is. They've got one snippet from Safra

Catz, the CEO, who says that when Rimini offers its services at 50 percent off, it breaks the bonds of trust with its customers. That's their evidence of irreparable harm.

Your Honor, she's referring to Oracle -- or, excuse me, to Rimini's existence, its ability to offer support services in the marketplace; again, what the Ninth Circuit has said is lawful competition in the market for support services.

What Ms. Catz did not say was that the specific act of local hosting the PeopleSoft development environments caused any harm to Oracle. What Ms. Catz did not say was that the specific act of future customer cross-use as to JD Edwards or Siebel caused any harm to Oracle.

That's the evidence that Oracle is required to come forward with to sustain a permanent injunction under the law, and that's the evidence that is entirely missing from this record.

Remember the four-column chart I put up that shows the specific grounds for the Ninth Circuit's affirmance. To get an injunction Oracle would have to tie each of those grounds, each of those specific acts, to loss of goodwill or some other allegedly irreparable harm. And it can't do that. It didn't even try to do that. It

speaks in these vague generalities. Even today Mr. Hixson talked about infringement caused irreparable harm.

Well, we're not talking about infringement in the air, Your Honor, we're talking about specific acts of infringement that survived the motion to dismiss, summary judgment, trial, verdict, post-trial motions, and appeal, and those specific grounds, local hosting for PeopleSoft, future customer cross-use for JD Edwards and Siebel, there is no evidence that they would cause any harm to Oracle.

And there's a good reason for that too. Before the trial even started in this case, Your Honor, Rimini had changed its processes so that it does not engage in local hosting of the PeopleSoft product or future customer cross-use of the JD Edwards and Siebel products.

This is not a matter of speculation. We put in evidence sworn declarations on this. Oracle has never deposed the affiants. It's never put in any contrary evidence. Remember, Oracle has the burden of proof.

But we have put in evidence that shows they can't win. They have no contrary evidence.

They simply say, and you heard Mr. Hixson say it again today, Well, we think Rimini's going to continue to infringe.

There's two problems with that, Your Honor. First is -- I'm going to sound like a broken record on

this -- we have a second case. We have *Rimini II*, the whole question of which, remember, was filed by Rimini. We are the plaintiff seeking a declaration that the current processes do not infringe. So if Oracle really thinks Rimini is still infringing, there's a second case to sort it out.

And the second is what the Supreme Court told us about the power of injunctive relief, and this is the NLRB case. And we cite this at page 23 of our opposition:

> "The mere fact that a court has found that a defendant has committed an act in violation of a statute does not justify an injunction broadly to obey the statute and subject and the defendant to comment proceedings if he shall at any time in the future commit some new violation unlike and unrelated to that which he was originally charged."

And that's really what the injunction that Oracle is asking the Court to enter would do. It would set forth a whole new set of prescriptions, requirements, prohibitions, and so forth that have nothing to with local hosting or future customer cross-use, and it would be traps for a contempt proceeding. An junction, Your Honor, is perspective. It's designed to prevent future misconduct.

There is not one wit of evidence in this

extensive record that Oracle -- or, excuse me, that Rimini is ever likely to repeat in the future the local hosting or future customer cross-use problems that the Ninth Circuit based its liability verdict on.

And this is not a matter, as Mr. Hixson derogatorily says, of voluntary cessation. This is a matter of a new company, a young company, a new entrant to the market that read the licenses one way, that was informed by a court of a different reading, and immediately brought its conduct into compliance with the court's orders. That's a law abider, not a law breaker.

Rimini is committed to following the law. Rimini is committed to providing support within the terms of the licenses. If Oracle would tell us how to do it, we would be happy to have that conversation. But they don't. They just say whatever we do is illegal. But the Ninth Circuit doesn't agree.

One more problem with irreparable harm, Your Honor. Even if Oracle could prove harm, and it didn't, and even if it could prove that such harm would cause -- you know, be irreparable in the future, and it can't, it can't prove that any harm was caused by the specific acts of infringement.

We've made this point again a half dozen times, and Oracle never responded to it until its reply brief in

this case. The causal nexus requirement, which is applied in both the Federal Circuit in patent cases and the Ninth Circuit in copyright cases, is a component of the irreparable injury requirement. It is necessary for the proponent of the injunction to tie the alleged irreparable harm to the specific acts of infringement that it seeks to enjoin.

Oracle hasn't even tried to make this showing, Your Honor. It cannot make this showing because there is no evidence for it.

In its reply brief, as I say, Oracle, for the first time in this litigation, addressed the causal nexus requirement. It says this. I put it up on the slide, on slide 19. Its basic argument is, the word "directly" doesn't appear in the Ninth Circuit's "Perfect 10" decision.

Our argument was Ms. Catz did not testify that Oracle's purported loss in goodwill was directly tied to specific infringing features; and Oracle's response is the word "directly" appears nowhere in the Ninth Circuit's decision.

But let's unpack that, Your Honor. First, the word "directly" does appear in every one of the Federal Circuit causal nexus decisions, so Oracle's belated argument on this point is a concession that they can't meet

the Federal Circuit requirement, which we submit is the controlling requirement on this point. So we know that so much.

Second, they want to focus on "directly," but they don't focus on the more important point, which is Ms. Catz did not testify that the purported loss in goodwill was tied in any way whatsoever, directly, indirectly, or otherwise to the specific acts of infringing conduct. They don't have any response to that because, of course, she did not make any such evidence.

And for that reason, Your Honor, and this is the third point, Oracle can't meet the Ninth Circuit's standard on its own terms. The Ninth Circuit's standard, and it's on slide 20:

> A party must show a sufficient causal connection between irreparable harm to its business and the particular acts conducted by the defendant.

They don't have any evidence of that, Your Honor. They can't make that showing. They've never tried to make that showing, and they don't today.

All that Mr. Hixson said today on this point was that infringement, quote/unquote, causes the harm.

Your Honor, infringement is a word of much malleability. And we're not talking at this point in this

litigation about infringement in the air, we're talking about the specific acts of infringement that were sustained by the Ninth Circuit as the basis for liability, and there is no evidence tying those to this.

A couple more points, and I'll wrap up. First, Your Honor, Oracle has repeatedly raised, and Mr. Hixson did it again today, this false argument this if Rimini has really ceased its infringing conduct, then it has nothing to fear from an injunction.

The problem is, the injunction proposed by Oracle has no relation to the conduct that has been adjudged to be infringing. The injunction proposed by Oracle is so far beyond it, it's like what the Supreme Court described in that NLRB case, they say that because Rimini committed one narrow infringing act or two narrow infringing acts, they can be enjoined from a world that Oracle's lawyers dreamed up. And I'll give you just a few examples of this, Your Honor.

I'd like to point out that at appendix 3 to our opposition, which I've reproduced at tab 4 of the booklet, we put in a copy of Oracle's proposed injunction with a line-by-line, word-by-word set of objections to it. I'm not going to go through that today. I just want to be clear that we have objected to virtually every part of it and explained in very specific terms why.

But at a higher level of generality, let's think about what the problems are here.

Your Honor, the proposed injunction would require Rimini's customers to affirm in writing that the services are required by the licenses. That requirement has no basis in the Copyright Act, no basis in the licenses, no basis in any ruling of this Court, no basis in law, equity, or common sense. It's just made up because Oracle wants to make it more difficult to provide support services. It would violate the First Amendment rights of the licensees, and it is absolutely untenable.

Second, Your Honor, the proposed injunction would prohibit the creation of derivative works. And Mr. Hixson spent a fair bit of time on this.

Derivative works is a big deal in *Rimini II*. There's going to be a lot of litigation about derivative works.

Oracle, as usual, is trying to prejudge that second case by getting an injunction here against derivative works.

Derivative works were not decided in the first case. We didn't appeal it because there's no judgment on derivative works, Your Honor. The jury's instructions, Instruction 21 on PeopleSoft, Instruction 23 on JD Edwards and Siebel, were limited to copying, the reproduction

right.

There was a stray testimony at trial about derivative works, and derivative works was listed in the jury instructions in the statutory prohibitions. The jury was not instructed on and did not find anything regarding derivative works or distribution for that matter.

This whole case involved the reproduction right, as the Court presumably recalls from the trial.

Oracle is trying now to expand the judgment. That's not the proper role of an injunction. The proposed injunction would broadly prohibit cross-use using -- you know, Oracle made up the word cross-use for this litigation, and then for the injunction it made up a bunch of other words, support and benefit and so forth to expand the concept of cross-use and put them into an injunction. Well, that's not right, Your Honor. Cross-use wasn't decided by the Ninth Circuit, as we've discussed. And the licenses are what the licenses are.

Oracle doesn't get, by the way, an injunction against a breach of contract. There's no such thing. You don't get to enjoin a breach of contract. But that's what this whole cross-use section of the Oracle proposed injunction is.

The proposed injunction would prohibit accessing source code, even though the Ninth Circuit recognized that

accessing source code is required for providing support services. This is just blatantly contrary to the Ninth Circuit opinion. It's also a flagrant violation of the First Amendment.

Imagine if Oracle presented an injunction to this Court that said Rimini can't read a book published by Oracle or can't watch a movie put out by Oracle. You know, to say that we can't look at the source code is not consistent, Your Honor, with the First Amendment.

And the proposed injunction would impose site restrictions, local hosting-type stuff on products, including JD Edwards and Siebel, that not only do not have site restrictions in the licenses but that the Ninth Circuit expressly said do not have site restrictions in the licenses.

So, Your Honor, over and over again, Oracle is imposing or proposing injunctive prohibitions that do not tie to the Ninth Circuit opinion, they don't even tie to the verdict and judgment in this Court.

Your Honor, this is not a copyright injunction at all. It's an effort by Oracle to impose an uber license on Rimini and all of its own customers with terms that were never negotiated and have this Court sit to supervise, as sort of the board of license appeals, all of these -- this wish list of things that Oracle would like to have, but

that the Copyright Act does not require.

It would be an abuse of discretion, Your Honor, an abuse of discretion, to enter this injunction. But we don't need to go there.

During the oral argument, and this is the last point I'd like to make, I think it's important to reflect on an important question that Judge Friedland posed again to Oracle's counsel. And I put this up on slide 23.

And Judge Friedland said:

> "I don't really understand why there also needs to be an injunction, when it seems like Rimini is trying to comply, and where there is a whole lawsuit to figure out if they're complying with the liability determinations."

Your Honor, Oracle didn't have a good answer then, and it doesn't have a good answer now. It didn't address this in its briefing. Today Mr. Hixson gave you two arguments. First, he said that *Rimini II* can't deal with the situation of potential clients who were deterred from signing up with Oracle and decide to go instead with SAP or Salesforce because Rimini's existence in the marketplace.

I think the legal term for that, Your Honor, is hoo-ha. There is no evidence of that, not in this case, anyway. It's never even been suggested by Oracle. That's

the first time Oracle has ever made that argument.

You know, they've got the burden of proof here, and to come in here and just pull out a wild hair I don't think will do it.

Second, with more substance, Mr. Hixson said, Well, we have the right to exclude. Oracle, he said, didn't choose to license its software.

Come again, Your Honor? Oracle chose to license its software. Oracle has millions of licenses. Oracle has licensed every piece of software at issue in this case. Every product line is licensed by Oracle to its customers who are also Rimini's clients.

Every single license permits the licensee to contract for third-party support. It did choose to become a licensee, and it doesn't have a right to exclude. It gave up that right when it entered into those licenses. And to now come to this Court and to say that the right to exclude is at stake mistakes what the entire lawsuit is about, which is the term of those licenses.

The real answer, Your Honor, I submit, is the one that Mr. Clement gave in the Ninth Circuit. The only answer he had was the ability to hold Rimini in contempt. They would like an injunction, because they would like more litigation. As if this case hasn't spawned enough lawyers and papers and court hearings and trials, Oracle would like

contempt proceedings on top of all that.

It wants the Court to enter this very broad, very vague, very amorphous injunction so that every time Rimini turns around Oracle can file another contempt proceeding and come to this Court and say, Let's have it out.

Your Honor, we would be back before this Court again and again and again. The Court has observed that these are litigious parties.

I think there's no doubt about that on the contempt. But, again, it's not necessary. We have the second case. If Oracle has legitimate concerns about the current processes, the way that Rimini is actually performing its support function, those can and will be decided in the second case. It's time for the first case to come to an end.

If the Court denies the injunction, it's over. If the Court grants the injunction, I'm sorry, Your Honor, but we have no choice but to appeal. That's the stark choice here.

We submit that it's time for this case, the first case, to simply come to an end and let the parties' remaining disputes, which involves the current processes, be resolved in the context of the second litigation, which is ongoing. Therefore, the injunction should be denied.

Unless the Court has any questions?

THE COURT: All right. No, I don't. Thank you very much, Mr. Perry.

MR. PERRY: Thank you, Your Honor.

MR. HIXSON: To circle back on the right to exclude, what I said, obviously, was that Oracle did not license its software to Rimini, its competitor.

Of course Oracle licenses its software to customers that pay Oracle money for that. That's completely different from the right to exclude that it wants to use here against a competitor that's infringing its products and using its products against Oracle.

I guess as an overall summary of Mr. Perry's argument is that most of it was about the wrong lawsuit. It was as though he were presenting oral argument in *Rimini II*.

He began by talking about the doctrine of preclusion, and he cited to you Section 27 in the Restatement Second of Judgments. This is his explanation for why grounds that were actually decided by the Ninth Circuit are the ones that are binding.

Grounds that are reached by a court of appeal are binding in a second lawsuit between the two parties. That is what the Restatement Second of Judgments 27 applies to. That is what is binding in *Rimini I* as applied to

Rimini II. That has nothing what to do with what we're here about today, which is about *Rimini I*.

And we can look at this in one of the slides that Mr. Perry had where he quoted the Ninth Circuit interpreting Section 27 of the Restatement Second of Judgments, where it says:

> "It is a well-established principle of federal law that if an appellate court considers only one of a lower court's alternative bases for its holding, affirming the judgment without reaching the alternative bases, only the basis that is actually considered can have any preclusive effect in subsequent litigation." In another lawsuit.

Comment A to Section 27 of the Restatement Section of Judgment clarifies what that means.

I looked this up while Mr. Perry was talking. It says:

> The rule of issue preclusion is operative where the second action is between the same persons who are parties to the prior action with respect to the particular issue which the second -- whether the second action is brought by the plaintiff or by the defendant in the original action.

It may be that the issues the Ninth Circuit reached are what are binding in the future litigation between Oracle and Rimini or in the *Rimini II* case. But we're here to talk about what you should do on remand in *Rimini I*.

And under the rule of mandate and the law of the case, all of the determinations that you made and the jury made are still binding on you in this action.

Everything that Mr. Perry said on this point, all of his reliance in the Restatement Second of Judgments was just a complete distraction because he was talking about the preclusive effect that one lawsuit has on another lawsuit.

He argued, for example, that cross-use was not really decided by the Ninth Circuit in this case because they didn't reach it.

What the Ninth Circuit actually said is -- and he argued that it really should be treated as a contractual issue. The Ninth Circuit said:

> "With respect to cross-use Rimini's assertion made for the first time in its reply brief to us that cross-use is a contractual rather than a copyright issue is not properly before us. The principle case on which Rimini relies was not cited in Rimini's opening brief

and on appeal arguments not raised by a party in its opening brief are deemed waived.

So look what happened. We proved on summary judgment that Rimini was committing cross-use, you ruled that that was copyright infringement. What happened on appeal? They didn't challenge that in their opening brief.

So we have a decisive decision by you their cross-use was illegal and infringing.

The reason the Ninth Circuit didn't address that with respect to at least PeopleSoft is because Rimini didn't challenge it. Rimini waived it. Again, when a litigant loses on an issue in the trial court and then doesn't appeal it or waives that appeal, then that ruling stands, and you should stand by your earlier determination of cross-use.

The same thing happened with respect to Database, where Mr. Perry says that this issue about Rimini, whether Rimini can rely on its customers' copies of Oracle Database wasn't actually decided. The reason it wasn't decided was because of waiver.

The Ninth Circuit again says that Rimini's arguments on appeal with respect to Database are the same as those with respect to the other software issue, except that here Rimini contends, as Mr. Perry says here, that his acts, in fact, were authorized by the Oracle license and

service agreements.

The Ninth Circuit continues: Oracle properly points out that Rimini has waived at this point because it has failed to challenge the district court's legal conclusion that Rimini was not entitled to assert the OLSAs as a defense.

So, again, you reached the issue on summary judgment, and they waived it on appeal. Their waiver should not cause you to narrow the scope of your permanent injunction. Because under the rule of mandate and law of the case, that continues to be binding in this *Rimini I* action.

What's preclusive in the second lawsuit is a totally distinct issue. And that's simply a distraction.

Apparently that distraction is a large part of their opposition to the permanent injunction motion that they're treating as if we filed a motion in the second lawsuit, which isn't accurate.

And so I think when they have now finally, at last, given us their explanation for why it is that you should limit the scope of your injunction to the issues that the Ninth Circuit reached, we can see that it just doesn't make any sense. It's a simply error in law that Rimini is making. They are ignoring the fact that this is a first lawsuit and not a second lawsuit. The issues of

clarifying estoppel and issue preclusion are simply inapplicable when we're residing still within the same first lawsuit.

Rimini then makes a couple of other arguments with respect to irreparable injury that at least are relevant in the first lawsuit. They say, and this continues to baffle me, that we've never cited a case in which innocent infringement was infringed. That's not true. On page 5 we collect several of them, and our reply brief cited them as we have before.

Mr. Perry argues that Rimini's infringement was innocent because they read the licenses and simply interpreted them differently than Your Honor did and that the jury did. That's not true. The testimony at trial was for the most part that Rimini didn't read the licenses. They weren't aware of what they said. That was their principal defense.

Mr. Perry argues that Oracle has failed to tie the specific infringing acts to the harm to their goodwill because Safra Catz testified that Rimini's statements and conduct damaged the bonds to the customers, and they say that that's not sufficient.

But Oracle doesn't have to prove its entire case through one witness, which is actually what Mr. Perry was arguing right now. Oracle proved its case through multiple

witnesses and a lengthy trial.

A key aspect of our proof showing the harm to business reputation goodwill was testimony by Mr. Ravin himself, and testimony by Oracle's witness, Professor Davis, that Rimini's infringing acts produced efficiencies, that because they didn't develop any of their own software -- Mr. Ravin was quite proud of this, that they didn't develop their own competing software product -- they didn't entail any of those development costs, so they were to offer support at 50 percent off.

And Mr. Davis showed the massive cross-use that enabled them to gain efficiency and then to scale. They tied the specific infringing acts that Rimini committed to Rimini's ability to deliver support at a lower cost, and then Ms. Catz and Mr. Screven tied the loop by explaining that Rimini going out with this cut-rate offer, when it didn't have any of these expenses to incur, damages the harm to goodwill.

So Oracle used several witnesses to establish the linkage between specific infringing acts and the irreparable harm to Oracle.

With respect to voluntary association, again, Mr. Perry ignores the point that I focused on in my opening remarks and that the Court focused on in your September 2016 order, which is that when the cessation comes only

after a dispute of litigation and a court has ruled on summary judgment that the defendant's practice is unlawful, then there's no guarantee they won't resume in the absence of an injunction, and in that situation courts don't regard that as a valid cessation -- a voluntary cessation because it was under judicial compulsion.

That's exactly what happened here. And just as you followed in your 2016 opinion, I think you should do that here for the same reasons as well.

With respect to their objections to the scope of the injunction, most of these things we litigated two years ago, and again we addressed them with respect to our reply brief. Their big issue, once again, is that they only want the injunction to reach the specific issues where the Ninth Circuit addressed them on the merits.

That's their big push for you here today. That's how their entire opposition is briefed is they think that only those things that the Ninth Circuit specifically reached.

But that's just a legal error. That's confusing of the doctrine of preclusion, which deals with the effect of one lawsuit -- the outcome of one lawsuit on a second lawsuit with what you should do when you're still within the first lawsuit.

In this lawsuit you made legal determinations of

copyright infringement liability, and the jury also made those determinations. That verdict was affirmed. No part of it was reversed. It wasn't limited. It wasn't modified. The Ninth Circuit didn't criticize anything you or the jury did with respect to copyright infringement liability. They didn't reach necessarily every issue because Rimini waived a lot of them and didn't raise others. But that verdict was affirmed.

So for purposes in this case there's no reason for you to go back and revisit your or the jury's prior holdings.

The effect of your holdings in this case is a legally distinct question from the preclusive effect of this action and subsequent litigation between the parties. I acknowledge that. The Restatement Second of Judgment, Section 27, does draw that distinction.

But it's fundamentally wrong for Rimini to treat this remand, this renewed motion as if it were a second lawsuit, a totally distinct action and that Oracle needs to show the issues of preclusion apply. We don't need to show that because we're still within the first lawsuit. And that resolves the bulk of Rimini Street's opposition and shows that it has no merit. And, again, we ask that you enter a renewed permanent injunction.

Thank you, Your Honor.

THE COURT: Thank you, Mr. Hixson.

Well, we've gone for an hour and a half. Let's take a 10-minute break. We'll resume at 3:20 sharply.

COURTROOM ADMINISTRATOR: Please rise.

(Recess from 3:06 p.m. until 3:21 p.m.)

COURTROOM ADMINISTRATOR: Please rise.

THE COURT: All right. Have a seat, please.

So we'll talk about attorney's fees now.

Mr. Pocker.

MR. POCKER: Thank you, Your Honor.

Like Mr. Hixson, with the 45 minutes that's been allotted to my argument, I would ask that 15 minutes be reserved to respond to whatever Mr. Polsenberg might present.

THE COURT: All right. Fine.

MR. POCKER: Thank you, Your Honor.

Your Honor, I have a much simpler matter to address with you, perhaps, than what you just heard with respect to the injunction issue, and that is in connection with your prior ruling awarding attorney's fees as part of the costs that can be assessed pursuant to 17 U.S.C. Section 505.

Those attorney's fees were awarded in the amount of $28.5 million, just over -- well, just under 24 months ago in your order of September 2016.

The Ninth Circuit has, as with the injunction issue, sent part of this issue back in light of the Ninth Circuit's decision to reverse the claims -- the verdicts in favor of Oracle with respect to the claims under the state law computer access claims.

And what we're asking you here to do today, by way of our renewed motion for attorney's fees, is to reinstate the award to Oracle in exactly the same amount that you adjudged back in September of 2016, that's $28.5 million in attorney's fees.

And my explanation for that requires a little bit of a walk down memory lane with respect to the procedural posture here.

As the Court will recall, summary judgment rulings were issued in 2014, in February of 2014 and August of 2014, which resolved many of the issues between the parties.

Nonetheless, there was a September 2015 trial that was necessitated by the remaining claims, which resulted in a jury award of $50 million on three claims presented to the jury in favor of Oracle.

That jury further awarded $35.6 million to Oracle for copyright infringement. That was the component of the 50 million. And the other $14.4 million was awarded for violations of the Nevada and California computer

statutes, which were later reversed by the Ninth Circuit.

On September 21st of 2016, this Court held a lengthy hearing here with respect -- or, I'm sorry, issued its order after a lengthy hearing conducted in May of that year, which made the award of attorney's fees, which we want you to reinstate.

You awarded $28,502,246 after applying a 20 percent reduction in the amount of attorney's fees that were originally sought by my client. You also awarded $22.5 million in prejudgment interest on the infringement judgment and awarded $16.2 million in costs, all under your authority under 17 U.S.C. Section 505.

The January 8th, 2018, ruling by the Ninth Circuit affirmed that Oracle was successful against Rimini on each of the 93 copyright claims, and the jury's $35.6 million copyright judgment was affirmed.

And I know from the dialogue that you've just heard, there may be many interpretations of, at least from the Rimini side, as to what the Ninth Circuit did or did not do. But that's clear.

Oracle was a clear winner, both at trial and on appeal, for its copyright infringement claims on all 93 of the copyrights. The prejudgment interest, the Ninth Circuit affirmed that as well, in the amount of 22 and a half million dollars, just as the Court awarded down below.

In the course of doing so, the Ninth Circuit observed that you had made an extensive and detailed record throughout many years of complex and contentious litigation, and it acknowledged your understandable frustration with Rimini's litigation conduct is apparent in some of the orders now before us.

Nonetheless, they went ahead and ruled to affirm your ruling as to the costs as well.

As to copyright costs under the statute, $16.2 million were awarded after a correction for what turned out to be simply a calculation error.

The Ninth Circuit reversed only two claims, and those were the state computer access claims I've referenced earlier for which the jury had awarded $14,427,000.

Now, as to the attorney's fees, the Ninth Circuit didn't spend much time with it, but because it had reversed the judgment with respect to Mr. Ravin's liability, it reversed his liability for the attorney's fees, and it vacated the fee award that you had entered earlier, in September of 2016, and remanded simply for reconsideration in light of Oracle's more limited success at litigation, ostensibly, okay, there's two fewer claims that Oracle prevailed upon.

And basically what they are asking, or why they sent this back and why we have renewed our motion, is to

see whether it makes any difference at all that those particular claims were reversed at the Ninth Circuit level when it comes to this Court's assessment of what the appropriate award of attorney's fees should be.

Now, you would think from the opposition in this case and yet two more expert reports from lawyers in southern Nevada that this was a larger issue than the Ninth Circuit really has identified.

Rimini Street has decided to go down the Alice in Wonderland rabbit hole and start to talk about billing rates and legal markets and creative ways to reduce the award of attorney's fees based on percentages of success under one metric or another.

But I would submit to you that we've been here, we've done that, and you have already made the correct rulings with almost every facet of the analysis that the Court is required to do in order to decide attorney's fees.

All that's really left here is whether or not the factor that talks about the success, the relative success of the claimant for the attorney's fees is affected at all by what happened at the Ninth Circuit.

And we would submit to you that it is not and that the amount of the attorney's fees that you have already awarded in this case is justified even in the absence of findings on the state law computer claims

because they are an inextricable portion of the proof, the evidence, and the work that was necessary for this case in order to be a successful copyright infringement case.

And we can't lose sight, Your Honor, of the fact that we're here seeking the attorney's fees as part of the costs to which we have been deemed entitled by this Court's ruling and the Ninth Circuit under 17 U.S.C. Section 505.

It isn't an invitation from the Ninth Circuit to send you back into the 700 pages of expert reports and billing statements and all of that, that we dealt with two and a half years ago. We're past that. The only question here is whether or not anything needs to change in light of the Ninth Circuit's decision.

Well, it's funny how the more things change, the more they stay the same. The Ninth Circuit decision does not alter this Court's prior analysis or require a reduction in the awarded fees. It's a very narrow one, the remand focusing solely on whether to reduce these fees based on the reversal of state computer access claims, and, if so, if you choose to do so, by what amount.

Now, contrary to what Rimini suggests, and this should be no surprise given that our clients obviously disagree on the meaning of the Ninth Circuit language and decisions, but contrary to what they suggest, the Ninth Circuit decision in no way requires any reduction in the

prior fees award.

In its opposition to our renewed motion, they attempt to relitigate much of which you've already decided and some of which the Ninth Circuit has already considered and rejected, instead of focusing on this very narrow remand issue.

I say with respect to your prior findings, and I'm going to summarize these relatively quickly, but many of the Court's findings from the prior order are completely unaffected by this Ninth Circuit remand, including, most importantly, Oracle's degree of success on its copyright claims, which is the sole basis for seeking attorney's fees as a portion of costs in this case.

The fact that these two state law claims did not ultimately prevail at the Ninth Circuit alters not at all the total victory and the enormous success that Oracle had with respect to its copyright claims, copyright infringement claims.

It also doesn't change a thing about the analysis the Court had of the objective reasonableness or unreasonableness of Rimini Street's defenses and litigation conduct with respect to making its case. The very same factors that led to the Court's decision in the prior case are still the law -- are still the facts of this case, still the observations, and every one of the observations

you made before changes not at all based on the Ninth Circuit's decision.

Nor is anything altered about the analysis that the Court engaged in with respect to the necessity to make Oracle whole. Nor with deterrence.

This Court analyzed whether or not an award of attorney's fees would seek to deter not just Rimini Street, not just Mr. Ravin, but any third-party support provider from engaging in copyright infringement. And that is a valid concern, one of the factors that the case law says you can analyze, and nothing about what happened with respect to the two state law claims alters your prior conclusions at all.

And, lastly, the Court is required to consider the purpose of the Copyright Act in making these attorney's fees' determinations, and nothing is changed with respect to where the Court wound up last time in the analysis that it entered.

Now, under Section 505 of the Copyright Act, as I've noted before, the attorney's fees are a component of the costs. The Court is not required to give them, but they may make them -- may award a reasonable attorney's fee to the prevailing party as part of the costs.

There's no question Oracle is the prevailing party on all -- on the claims involving all 93 of its

copyrights.

I suppose we could have pled it as 93 separate claims to head off all these arguments about relative success and balancing the unjust enrichment versus the -- you know, JD Edwards' copyright violation and all the sophistry that's engaged in, in trying to minimize what happened in this case. But the scope of that is enormous.

This is an enormous victory. Oracle is the prevailing party. No one can in good faith contest that. The Ninth Circuit has affirmed it.

And if we turn to the next question, which is applying the legal standards that we just referenced a few moments ago, we see that nothing has changed here as well. Oracle's degree of success remains unchanged. Not a single copyright claim was reversed on appeal.

We received, after the Ninth Circuit calculations and adjustments were made, more than the value of $74 million in combined damages, prejudgment interest, and attorney's fees, which is a large and extremely in the abstract large damages award, and it is multiple times, close to six to seven times, the number of damages that Rimini Street thought was appropriate -- or their expert thought was appropriate during the litigation of this case.

Back then they said, Oh, their damages should be $11 million because if we hire a few more people we

wouldn't have had to infringe. The jury disagreed. And now it's been up through the appellate pipeline, and we're at $74 million. Significant success on behalf of Oracle.

The facts about Rimini's objective unreasonableness haven't changed either. And I know it's the past, and we revisit this history often, but it's important to do so because it's an important part of the analysis that this Court had to undertake.

They have engaged in litigation misconduct, and they adopted false factual and legal positions that forced Oracle to spend time and resources on unnecessary discovery, further fact investigations, experts, motion practice.

The Court was right when we had the hearing two and a half years ago and the Court observed at trial the impact of Oracle's unreasonable positions in this case on the length of the trial, the amount of attorney time and witnesses that were required to rebut their clearly false allegations.

This case became a monster because Rimini Street misbehaved. It all started, and this is in the papers, when Mr. Ravin chose to be held in contempt in connection with a deposition that was supposed to be held in the SAP TomorrowNow litigation over in California rather than to go under oath and explain how Rimini Street was operating.

Eventually, after being held in contempt, he did, in fact, give a deposition. It was like pulling teeth. But throughout his deposition history, both in that case and in our own litigation, he has repeatedly denied that cross-use ever happened, cross-use which is at the center of the whole infringement and the Ninth Circuit decision.

Five and a half years after Oracle filed suit, that's after five and a half years of multiple attorneys scrambling and seeking to find out exactly what Rimini Street was up to, five and a half years of legal fees, litigation, depositions, motions, meets-and-confers, all of the expensive attributes to complex litigation, during his trial testimony Mr. Ravin finally admitted to engaging in cross-use, in his words, quote, all the time.

What could have been saved, how better and more efficient this litigation might have been had there just been a little early honesty. And that's part of the track record here that builds into this factor of their unreasonable position.

In court filings and testimony Mr. Ravin and other Rimini Street executives similarly denied cross-use for years up until that day when under cross-examination from Mr. Isaacson he finally said, Oh, yeah, we do that all the time.

There were also statements made in the context of the summary judgment briefing with respect to the JD Edwards and the Siebel environments and how they were used at Rimini.

As you'll recall, ultimately Rimini was found to have used those environments for purposes of -- that infringe Oracle's copyrights. Back at the time of the summary judgment motion, they placed before this Court in their opposition evidence that maintained that they were just copies made for archival purposes which was permitted by the license.

Those representations and that false evidentiary milieu caused this Court to have some pause about granting full summary judgment on all those issues and, as a result, those issues had to be addressed at trial, where it was fully demonstrated that -- and through the testimony of Rimini Street witnesses, that those environments had, in fact, been used for purposes other than what Rimini Street maintained during the summary judgment briefing.

The unnecessary expenses that were added are numerous, and we've walked through them in the other context in the past.

One of the biggest roadblocks to doing this case in an efficient way was their destruction of the library of Oracle copyrighted material that they destroyed after

becoming aware that litigation over this issue was in the works.

They -- the Court, through Magistrate Judge Leen, initially, and then this Court adopting her findings, of course, did issue a spoliation order involving Rimini Street. And there was the adverse inference instruction at trial. But then there's the other impact of all that, which is what would have been practically the smoking gun as to what Oracle products and copyrighted materials Rimini Street was using improperly instead no longer existed and Oracle had to spend a few years of depositions, expert investigation, analysis of millions of pages of documents produced by the two sides in order to get to that point.

So it's no wonder that the Ninth Circuit found, quote, understandable frustration with Rimini's litigation conduct, unquote, and they understood exactly what this Court was going through and what the parties were going through.

All those findings relating to Rimini's litigation misconduct remain completely unchanged. This Court found earlier that Rimini's litigation position that it did not engage in copyright infringement was not an objectively reasonable position, rather it was based on a clear misreading of Oracle's software licensing agreements and a conscious disregard for the manner that Rimini used

and housed Oracle's copyrighted software programs on its own servers.

In fact, its position was so unreasonable that the Court was able at summary judgment to determine that Rimini Street engaged in massive copyright infringement of Oracle's copyrighted works, thereby leaving only a few issues for trial.

The Court said that then and the Court should say that now because it's still true, and nothing about the small change in what claims were ultimately upheld on appeal changes that at all.

Rimini's repeated instances of copyright infringement and its significant litigation misconduct in this action was also commented upon by the Court in a different context. The Court also, in its order granting attorney's fees, said it's undisputed that the defendants ignored their preservation obligations and destroyed evidence prior to trial, including a key computer directory containing Oracle software.

Again, observation that the Court made. Still true. Still important with respect to this issue.

Now, what is Rimini, in its opposition papers and in its approach to this offer, in explanation or in mitigation of the behavior that's been outlined here. Well, they feebly say that the reasonableness of

Mr. Ravin's conduct is not at issue, as, you know, you can't really blame him for this because he's no longer been adjudged liable for any of these claims.

Well, we're not seeking attorney's fees from him, so that is a complete red herring right there.

We hear over and over again, and I know we discussed it ad nauseam in the original attorney's fees briefing, this notion of their innocent infringer.

And as I discussed in the prior hearing and in the papers, you know, the whole notion of the innocent infringement versus willful had to do with the computation of the statutory enhancement should Oracle have chosen statutory damages over the other measures of damages that the jury found.

It's really in that context, it's almost a step lower than an advisory verdict with respect to whether or not there should be an enhancement for those statutory damages.

But more fundamentally, even if they're right that this is an expression by the jury that at the time they were infringing they had no reason to know they were infringing, by the time the litigation started they did. And by the time its underway and they're looking into the evidence that they've seen and they're aware of what the arguments are as to why it doesn't -- or it does constitute

copyright infringement and not simply a use of their clients' licenses, by then I take it they should have read the licenses by the time this case began, because they're making representations about them in their summary judgment pleadings, all that innocence went away about three months at most into the discovery process. So it really doesn't matter with respect to looking at this. It does not mitigate or make reasonable Rimini's behavior in this case at all.

And, again, that's another factor that the Court found in favor of Oracle with respect to and what you should do so again even if you're going to engage in that kind of analysis. Moreover, it's been said in context, in many context, Section 505 does not condition an award of fees on the showing of willful infringement.

This Court recognized that in its order, and here we are again with the same arguments coming from Rimini that oh, no, no, no, no, we're an innocent infringer, you shouldn't give attorney's fees against us.

Then they make the curious argument without actually supporting it by case law that specifically holds so, that the Court must allocate specific expenses in the legal fees to specific misconduct in the context of the reasonableness analysis of Rimini's behavior.

Nowhere does the case law support that

proposition. In fact, if you look at our reply at pages 4 and 5, we distinguish all the cases that Rimini says that it says does make such a holding and a requirement.

And, more importantly, all the litigation misconduct that we're talking about here, it isn't your standard discovery sanction type stuff. This is behavior that unnecessarily made more complex and difficult the exploration of factual and evidentiary issues.

This is part of why this case became so complicated, why they survived a summary judgment they never should have. It's not, oh, you didn't file your interrogatory responses in time or you were dilatory consistently on this level.

So apportioning it to individual litigation misconduct, this permeates the entire way they approached this case. And as a result, that's why no apportionment to specific amounts is necessary.

Oracle was actually forced, and I think that's not too strong of a word, to disprove an enormous amount of false narrative, false information, and false evidence as part of putting on its infringement case. We wouldn't be there at that successful level if we hadn't had to basically treat this like a criminal case and find out, you know, you can't take at face value what you're getting in discovery here, you've got to do the extra work to expose

it.

The third factor, and I won't say much about this because the Court was right the first time, and nothing has changed, the analysis of what's necessary to make Oracle whole.

Now, Oracle spent far more than $28.5 million in attorney's fees, and the Court's familiar with that based on the briefing and all the argument that went on before.

But the Court has properly also determined that we've spent decades developing these copyrighted software products only to have Rimini come in and piggyback, whether legally, illegally, or infringing or not, on that substantial investment. Oracle was compelled to spend a significant amount of resources in legal fees and costs over what was eventually awarded in this case just to stop Rimini's conduct.

Without a fee award, the Court found that Oracle's investment and its intellectual property and its incentive to create future software would not be appropriately protected or compensated. That was true in 2016, and it is true now.

Moreover, Rimini's counter to that is this is a windfall for Oracle just because Oracle is a large company and we can pay this out-of-pocket change. Well, that's a complete red herring again and totally irrelevant to the

point of the necessity of making it worthwhile for Oracle to protect its hard-earned copyrights.

The deterrence issue. There's been some discussion of it in connection with the infringement analysis. But this Court has properly found that an award of attorney's fees is appropriate to deter Rimini from a pattern of infringing Oracle's copyrights. And that pattern, in our estimation, certainly persists.

It's a matter of record that a company started and highly influenced by Mr. Ravin, TomorrowNow, not only is it a civil infringer but they were convicted of federal criminal charges. And then we have the jury in our case finding infringement on the part of Rimini Street in our case, *Rimini I*.

And now we have *Rimini II*, where there are other alleged infringements, and obviously in our position there is infringement going on.

And then this whole issue of deterrence, the idea that, well, we're an innocent infringer, it was just a mistake, and we don't need to be deterred, well, they better have a wake-up call over at Rimini Street in light of what evidence has come out earlier this year, in March.

They told their open shareholders, first of all, that if your injunction -- and this is addressed in the papers, if the injunction actually is now entered while

it's being considered by the Court, that they're going to have to spend significant amount of money and change what they do.

Okay. Well, if that's true, that means some of what they're doing at least is still infringing. So the jury verdict didn't deter them, the battle over the injunction hasn't deterred them, and deterrence is something that is certainly something the Court can factor into under the standards in its award of attorney's fees.

The second thing that happened is they reported to their shareholders that they've received a federal grand jury subpoena, that they're the subject of a federal investigation.

Clearly some people do not learn. And this is part of the factual record that you go into whether or not in this particular case they need to pay a significant amount of attorney's fees in order to deter their behavior and anybody out there who thinks that this is now a legitimate way to compete with Oracle.

The Court has noted in its prior rulings that Rimini Street is built on a foundation essentially of copyright infringement. The Court hasn't used these words, but it's basically a parasitic business model. And that's why it needs to be monitored and looked at more closely.

And in this particular case, these statements to

the shareholders show that not a whole lot has changed as to how they're doing business. And under the circumstances, that adds even greater heft to the deterrence element in the Court's analysis.

The need to further the aims of the copyright laws is another of the factors. The Court got that one completely right in its order back in September of 2016.

Rimini has a strange way of dealing with that. They say that actually awarding attorney's fees to Oracle will do the exact opposite of furthering the aims of the copyright law because it will discourage starving artists and the smaller parties in these big commercial transactions from pursuing valid copyright defenses.

They point to Mr. Ravin having survived through the Ninth Circuit process without having an award against him for copyright infringement.

But what they ignore is Rimini Street has already been adjudged not to be someone who is putting forth meritorious defenses to unmeritorious copyright claims. They lost this.

So the idea that somehow if these fees are awarded and reinstated that that's a bad message to them, no, that's exactly the right message to them. You lose; you pay; there was nothing meritorious about your defense, starving artist.

I think the most important point, and I've probably belabored these other issues more than the Court needs to in its decision, but this is an extremely narrow remand, and it's solely to decide, well, is it going to be $28,502,246 or some other amount?

So when we look at this as to why we are asserting that you should keep exactly the same amount of attorney's fees, part of it is there's no need to reinvent the wheel here.

This Court -- and you're being asked by Rimini Street to engage in all sorts of formulaic reductions of the amounts and reanalysis of issues about who won what and who is the prevailing party and who had the most success, but even in reality it comes down to you've already been there.

The $45 million that we asked for in attorney's fees, the Court factored in all this nonsense that Rimini Street puts forth, and you reduce the award by 20 percent already to $28 million.

They want you to go back and say, Oh, but look at all these claims that Oracle did not prevail on or were dismissed or never reached the jury. Well, you already factored that in the last time. That was part of the factual milieu before. And even after all of their arguments about, Oh, my God, they only prevailed on three

claims, it's still $28 million.

So now it comes back to all right, so the two computer law offenses were overturned. What impact should that have on the attorney's fees that will appropriately compensate Oracle in this case? And our position is it should have absolutely no effect.

And the reason it should have absolutely no effect is that every dollar of that $28 million was spent putting together this case. And I -- this case is, in this Court's words, first and foremost and above all else a copyright infringement case, all other claims notwithstanding.

And all these -- and the Court recognized this the first time. There was no analysis that said, Well, you know, I need to shave something off, they might have actually done some research on unjust enrichment or this witness only had to do with another claim.

All of the claims, but, more importantly, all of the evidence, all of the work, went toward the copyright claims. If we had just simply had 93 copyright claims or one claim with 93 copyrights and no other claims here, this case would have been tried, investigated, discovered, and analyzed exactly the same way.

And that -- the notion that, Oh, well, you need to peel off some of the attorney's fees that might have

been only about those computer access claims, well, those access claims were gravy. The facts underlying them would have been proven whether or not they were in the case or not.

Because remember what it's all about, it's about Rimini Street using their robots and their spiders and their massive -- as part of their massive downloading to get all of this Oracle content off of the Oracle websites to start this business, to start this course of conduct which leads to infringement of those very copyrights.

One of the big issues in this case, Rimini kept saying, Oh, you know, we only take what our clients are entitled to. Well, we proved that wrong. And how did we prove it wrong? By proving these massive downloads, the very conduct that was part of the other -- the state law claims, as part and parcel of here's what they're doing. They don't need all this stuff. They're taking stuff well beyond what they're entitled -- their customers are entitled to under their license.

This was all part and parcel of a huge scheme, and it's impossible to sit there and say oh, okay, well, $3,000 worth of work was done on the computer fraud claims, but, you know, you can't pay that on the copyright claims because it's separate and apart.

The Court sat through the trial. And I think

it's interesting, the experts that are offered in this case are so beside the point, when the only expertise that's really required here is what happened in this case? What evidence was produced? What was our money spent on?

Because I think when you clear away all these formulas and testimony, that's what it's really about. And the bottom line is that $28 million was spent doing not only just proving the mechanics of a copyright infringement, but knocking down all the false statements and all the smoke and mirrors that Rimini put up in the course of representing what they did and didn't do.

And that bleeds right into these other tort claims that we had as well, that they were lying to customers and lying to everybody. That's part and parcel of they -- if, in fact, they were innocent infringers to begin with, they didn't stay innocent very long.

And like most who engage in wrongdoing, it's the coverup that takes them in. And it was the coverup of the copyright infringement that we needed to blast through. I'm sure the Court remembers the demonstratives with the law wall of lies and all of that.

But, you know, that's not too far from the truth here. And all this $28 million went to proving our copyright infringement case and knocking down the false representations and the clearing out the smoke, basically,

that Rimini Street was blowing most of the time.

This isn't the kind of case where you've got, oh, well, there's this dispute over the breach of contract A, and over here there's a dispute as to the breach of contract B. This is one big case.

And even if we didn't have these other claims in this case, all that stuff about Rimini's downloading and the impact it had on the servers, it's circumstantial evidence that, whoa, what are they doing? This is not servicing your client within the terms of a license.

That would have all been admissible under Rule 404(b). I know it's usually brought up in the criminal context, and that's where it usually comes to bedevil me. But all of this was coming in, so all the money that we spent on unearthing these facts, analyzing it, cutting through the nonsense on the other side, there's no apportionment necessary at all. It all went to the successful prosecution of Oracle's copyright defense in this particular case.

I could go on a little bit about some of the alternatives that have been processed by Rimini Street as to how this Court should address this issue. They'd like to revisit this whole ridiculous notion that we need to count up all the claims in the case and see who won more of them, and divide the number -- the amount of fees by the

number of successful claims and all of this.

Been there, done that. There's no need to go there again in light of this very limited development on appeal.

We hear the novel notion of the Ravin offset that should be taken against our attorney's fees. Never mind that said Seth Ravin hasn't moved for attorney's fees in this case. He hasn't put together the affidavits, the reports, everything that he would need to do so.

He's not a prevailing party, or if he is, he hasn't come forward with the attorney's fees -- attorney's fees' motion. There's no evidence that he even paid attorney's fees, and yet somehow that should be an offset against the attorney's fees that Rimini Street is responsible as a result of its infringement of copyrights.

So that's a complete red herring right there. And the fact that Dennis Kennedy and the other fellow say, Oh, that sounds like a reasonable way to deal with it, matters not at all.

The only expertise that's of any value here is the expertise that, quite frankly, Your Honor, only you possess, which is the knowledge of what's happened in this case for the last eight and a half years and marrying that up to the legal standards. That's the only expertise we need here.

There was also a proposal from Rimini Street to just reduce it by 50 percent because after all there's two defendants, and none of the claims against Mr. Ravin survived. There's no indication that half the fees were spent pursuing Seth Ravin and half the fees were spent pursuing Rimini Street on its own. That is a completely plucked-out-of-the-air type of proposal which has no real logical coherence and is there only in an effort to reduce the award.

I come back again to this notion of the limited success. The Ninth Circuit's language was in light of the more limited success of Oracle. And certainly that's just saying, Well, you know, there are these claims that they prevailed upon, now there's two fewer, what do you think? Does it change your mind or not?

Rimini has basically accepted it as a license to reopen this whole issue about whether there should be attorney's fees in the first place, what dollar amounts they should be. It's not that at all. With respect to, you know, all their ways to bake into the new award the lack of success, they completely ignore the fact that we did this before.

The $28.5 million in attorney's fees embraces, as the law permits, not only the fees on the claims for which we were successful but for the claims which we may

have been unsuccessful, so long as they were part of the common factual core and nucleus of the infringement case. And that's all we're saying, Your Honor.

The Rule 68 argument, I'm not even really going to go there. I think it was adequately litigated the first time we did this motion.

The offer made by Rimini Street was not more favorable than the ultimate outcome for Oracle, not before, not after the Ninth Circuit appeal. And it's especially so in light of what you've heard about the injunction.

Because if you look closely at their offer of judgment, their injunction allowed cross-use to continue. So how could that possibly be of benefit or of significant benefit to Oracle?

By adding that into their offer of judgment, they basically made it worth far more than its face value. And then, of course, there's a whole issue of the payment over time and all of that. The Court was right the first time, it would be right now to simply adopt the analysis that it made before.

Your Honor, I know I've spoken a long time concerning the issue that's so simple, but it really is.

What happened at the Ninth Circuit affects not at all the justness of awarding Oracle the $28.5 million in attorney's fees you awarded two years ago. It all went to

proving the successful part of this case. The law says if there's related claims that are so related to the corpus of the evidence, that they too can be the subject of reimbursement.

But in this particular case you really don't even have to go there. Every dollar spent was well spent, and it was spent on something that is reimbursable under the copyright statute at issue. Thank you.

THE COURT: Thank you, Mr. Pocker.

MR. POLSENBERG: Good afternoon, Your Honor. Dan Polsenberg for defendant. I'm going to be refreshingly brief.

THE COURT: Good afternoon, Mr. Polsenberg.

MR. POLSENBERG: I think I have friends on both sides of the room that have to catch flights.

Oracle says their position is simple, it's basically been there, done that. They effectively want you not to do what the Ninth Circuit asked you to do. They say that I want you to reexamine the award of attorney's fees. Well, that is true. I do.

But that's not why we have a hearing today. It's because the Ninth Circuit did remand for reconsideration, in light of the degree of success, the more limited degree of success.

And they present nothing. Oracle is right, it

is a simple argument that they're making, but it is too simple because they're not trying to help the Court at all in doing what it needs to do.

Under *Hensley* -- and they claim *Hensley* doesn't apply because it's a 1988 case, but I think it's a wonderful explanation of how to appropriate fees.

And in *Hensley* the court points out that you have to look at fees based on the degree of success. Now, there are two obligations under *Hensley*. There's the obligation -- there's the burden of the plaintiff in presenting their claim for fees to show why they are entitled to them, and there's also the responsibility of the court to explain how it has apportioned.

But here they don't want to apportion at all. And that, I think, is a terrible mistake on Oracle's part, and it would be an even worse mistake on this Court's part.

In *Hensley* the Supreme Court keeps talking about the burden of establishing entitlement, the relationship between the amount of the fee awarded and the results obtained. Again, they say the extent of success and the amount of the fees' award.

Now, Mr. Pocker says that I go into some -- I don't remember if he used the word "ridiculous," but detailed machinations about the number of claims. And there's probably a little bit of support for his position

in *Hensley* on that.

I don't think you have to do an arithmetic computation of the issues. But the Court was very clear that you do have to look at the degree of success involved.

Let me go through their claims. Now, yes, they had 12 cause of action, and they prevailed on one of them, we prevailed on 11. That would be 8.4 percent.

But I'm not going to rely on that because I think it is true that if they brought 93 copyright claims, I would still have most of the same argument that I'm going to make today. Let me explain what I'm talking about.

I don't use PowerPoint. Mr. Perry is very good at it. When I passed the bar, they had not yet invented electricity. So I use physical objects.

They brought a claim against Rimini for copyright infringement. They brought a claim against Seth Ravin for copyright infringement. They brought it for willful infringement so they could get additional damages so that they could get lost profits. Against both of them.

They wanted punitive damages against both of them. They also brought the state law of computer access and fraud claims. And they brought in a couple other claims, including -- we talked about trespass earlier today, seems like yesterday, earlier today, they brought trespass claims.

So a lot of these claims went by the wayside. Some were withdrawn. We went to trial essentially on these elements. The jury found there was infringement, but innocent infringement, found no willfulness, therefore no punitive damages. Seth Ravin prevailed entirely on the infringement claims, and then the Ninth Circuit reversed the computer access and fraud claims.

Here's their degree of success. It's not -- it's not just that, Oh, we prevailed on our copyright claims. They didn't prevail the way they wanted to prevail. They wanted all this and then all this again against Seth Ravin.

They wanted -- I kept saying -- for weeks I've been saying they were swinging for the fences, and this morning Seth -- or, excuse me, this morning West said they went for the kill. And that's what they did here.

Their degree of success is that they only got so much on their copyright claims, not that they prevailed on all 93 registrations, but they only got so much.

That's why we pointed out they really only got 14 percent of a quarter of the billion dollars in damages they wanted. They only got 27.7 percent of the copyright damages that they were seeking. This isn't just the elimination of 14 million -- I don't know, I can't believe I actually say things like just $14 million, but this is

looking at all the issues that go to their limited degree of success and now after the Ninth Circuit their even more limited degree of success.

So what do they propose? They say been there, done that. They don't even try to apportion. They have to do that to help you. Their failing to do that means that they don't get any fees whatsoever. And it leaves you in the situation where you have to examine all of this.

Oracle says, Well, the limited scope of the remand was look at the elimination of the two computer access and fraud claims. The remand doesn't say that. You're supposed to reconsider in light of the more limited success that they have.

They talked about law of the case earlier today. In their reply brief on attorney's fees on pages 1, 2, and 7, they argue law of the case. This isn't law of the case.

The Ninth Circuit did not affirm anything. They vacated. They sent it back down. You can reconsider anything now on the attorney's fees.

Now, I'm not going to go to all the detail that Mr. Pocker went to in talking about all the other topics, but the degree of success has been recognized by courts as one of the primary factors in determining the objective reasonableness or unreasonableness of a losing party. So effectively what we're looking at, here they're coming in

saying, Well, we lost on copyright infringement, but that's not the claim we were facing. We were facing willful infringement, lost profit damages, punitive damages. We were looking at all that.

Were we reasonable in going into court? We were reasonable in fighting the big claim that they brought.

Now, they're coming in and saying we were unreasonable about the little claim that -- on which Oracle prevailed. But look what we did in light of that. We made an offer of judgment for a hundred million dollars.

Now, I'm not arguing the offset of the damages amount right now. I'm talking about the position in which we found ourselves. We're in litigation, this company is trying to kill us. And they have this huge claim, and they're spending a great amount of attorney's fees fighting the bigger claim, the six salt shakers as opposed to the one.

And we make an offer of judgment for a hundred million dollars. That's more than they got. It's more than the $35 million they got for this. Even if you add interest and cost, that's 74 million.

We were looking at this case in a situation where, yes, we were reasonable in trying to resolve that. Justice Kagan in *Kirtsaeng* talks about the factors to consider in the award of fees, and she talks about how it

hinges on a party's attitude toward risk.

So if you have a weak claim and you're the plaintiff, you don't pursue it anymore. You have a weak defense, and you're the defendant, you abdicate your defense.

But we had -- while we didn't prevail on every aspect, we had a winning defense on the vast amount of the damages that they were seeking.

And we even tried to settle it at about the borderline. And we even were north of the borderline. So we were reasonable -- you know, I've got to get these all back to Peg's. We were reasonable in the positions that we were taking then.

Now, they come in and say, Well, that's not the only position that you look at, you look at the conduct and the misconduct. And I stand by what we said in our briefs. If there was misconduct and, yes, *Kirtsaeng* does talk about that, in a line, the court may order fee shifting because of the parties' litigation misconduct, whatever the reasonableness of his claims or defenses.

And they cite a Second Circuit case, *VivaVideo*. But in *VivaVideo* that was a case where they found willfulness. This wasn't a dispositive resolution saying if somebody engages in misconduct, you can shift all the fees.

And, yeah, *Goodyear* was an inherent power case, *Goodyear versus Haeger*. But I don't think the reasoning is any different here. If there's misconduct, the fees that are shifted must be related to the fees that they incurred because of the misconduct.

They don't get everything. Especially in light of what's already happened here. Judge Leen sanctioned us for our misconduct. The Court gave an adverse inference instruction. There are already remedial things and penal things that the Court has implemented. So it would be an abuse of discretion, I would argue, for the Court -- for the Court to go further.

And right after Justice Kagan cites *VivaVideo*, she cites another case, *Bridgeport Music*, and that's a case where they're talking about -- a plaintiff has hundreds of claims, and some are overbroad and some are reasonable, and the court has to take all of that into consideration.

Well, that's what this Court needs to do. They have claims that they were reasonable on prevailed. But they sought -- in the litigation itself they've sought far too much.

Does the limited degree of success factor into other issues? Yes, of course, it does.

Making the plaintiff whole. The purposes of the Copyright Act. Do we really want to be in a position where

we are encouraging people, plaintiffs, to sue for far too much and have the other side pay all the fees for that?

So it's getting late in the day. How much should we apportion? I have a lot of ideas.

Do we have appendix A?

In tab 5, Your Honor, you have appendix A, our opposition to the motion to renewed motion. Wow, that's great.

That lays out different ways to reach numbers that we have methodologies for that range from almost as low as a million dollars to almost as high as 8 million dollars.

Now, they don't like any of our methodologies, but they don't have anything that they presented.

And failing to have presented anything, I think they're in the position where they shouldn't get anything. But let's -- let me take you through a couple of different ways to do this.

We start with your 28.5 original award. I suggest we look at the offset, which we've called the Seth Ravin issue.

Mr. Pocker accurately points out we didn't move for attorney's fees for him. But I think he misses the point on what we're talking about. If we spent $4.7 million defending those claims, it would be a reasonable

assessment of how much they would have spent also pursuing those claims.

So that gives us $23.8 million. We're right at this column here, which you can't see me even if I go over there.

Now, their degree of success for damages, even for just their copyright claims, was only 27.7 percent, which would give them $6.6 million.

But I also think that we should have a further reduction in the amount of attorney's fees that you allowed. You allowed 80 percent of their attorney's fees, and that was in light of all the aspects of the litigation. But I think when they have pursued too much, when they have sought these large damages and only recovered a fraction of them, they should have a 30 percent markdown instead of a 20 percent markdown, reducing 20 percent to 70 -- or reducing 80 percent to 70 percent, 70 percent is 87.5 percent, gives them 5.775 million.

Let's do an easier one. Let's start with your 28.5, reduce that by their 27.7 percent, that gives them 7.9 million. Because I think you have to look at all the aspects.

But even if you looked only at the two claims the Ninth Circuit reduced, you have an offset for 29, 28, 29 percent of the damages, you have an offset of 50 percent

of the parties, you have an offset of 67 percent of the claims, the average of those is 49 percent.

They argue that their approach furthers the aims of the act. But in *Kirtsaeng* and in *Fogerty,* Justice Kagan and Chief Justice Rehnquist talk about how the act strikes a balance.

It isn't just allowing a plaintiff to bring a claim. It's looking at the public purpose, the purpose of enriching the public through the general -- the general public through access to creative work.

So we have to strike a balance through between two subsidiary aims, encouraging and rewarding authors' creations, while also enabling others to build on that work.

This is an innocent act of infringement. The Ninth Circuit -- even back before *Fogerty,* when the Ninth Circuit followed the approach where plaintiffs get all their fees, the Ninth Circuit said one of the considerations which justified the denial of fees is the defendant's status as an innocent rather than a willful or knowing infringer.

I don't think they've made out a case for fees. I've been clear on that. But even if the Court wants to grant fees, I really think the number is between 7 and 8 million. But if you were to go to 50 percent, if you were

to do 14.2 million, if you were to deny the injunction and cut the fees award in half, I would not have any motivation to take an appeal on the attorney's fees award.

Now, I've said before the scope of the remand lets you address every issue. So I think it's more than just the 50 percent reduction for what we're doing now. I think it's considering all of the factors in light of their limited success and now even more limited success. But we would be comfortable with that as a decision.

Thank you, Your Honor.

THE COURT: Thank you, Mr. Polsenberg.

MR. POLSENBERG: Mr. Pocker has used up his time, so he's going to let me leave this messy and clean up after the Court recesses.

THE COURT: All right.

MR. POCKER: Your Honor, I think I did go past 45 minutes, and your staff -- 42 minutes. I have three minutes, Your Honor.

THE COURT: Well, let me see. By my notes you have five minutes left, if you'd like them.

MR. POCKER: Your Honor, what we've just seen demonstrates the sophistry and the creativity that is being used by the other side to come up with these different measures. I mean, even this degree of success with the salt shakers and the claims and all this stuff, well, if we

have 93 salt shakers in which we prevailed versus the 11 that they prevail, it's all just a big game.

What the Court really needs to take into consideration on this is the fact that this was, as you declared, first and foremost, a copyright infringement case. It was tried as one, it was successfully tried as one, and they can talk about how, Oh, you only got 14 percent of the numbers that were thrown around as damages and whatever, but the award in this case is substantial, significant, and evidences success.

And this notion that somehow you have to make an award so that people won't overplead their cases, the courts and the progress of litigation has a way of weeding that out.

And in most instances this is another case of no good deed goes unpunished. We decided to tailor our own case to come forward and say, Well, we're not going to have this claim, that claim, let's get a writ of trespass to chattels, and all of a sudden it's a salt shaker. All of a sudden it's a reason why, you know, we have failed utterly. We're not succeeding to the degree that we have.

When the Ninth Circuit says more limited success, they mean more than the already extraordinary success we've already had. And all of the talk about, Oh, you need to reduce this, you need to reduce that, this

Court already reduced by 20 percent the amount of fees that we were asking for.

We submit no further reduction is necessary. We've clearly demonstrated that everything we've spent was in connection with the claims on which we were highly successful.

And under the circumstances, this is a simple one, Your Honor. Simply reinstate the award that you made before. All the analysis he now wants you to do again you did two years ago, properly, successfully, and with the input of everybody in this room, and it still stands, and that number should still be the number.

THE COURT: All right. Thank you, Mr. Pocker.

Well, thank you, counsel. I appreciate the arguments on both sides, and I compliment counsel on the professionalism that has attached to all of this.

I would anticipate I'll get a written decision to you in a fairly short period in time, no more than two weeks on the outside as I sit here. But in any event, I will give you a decision soon. And I appreciate having you here. I appreciate seeing everyone again.

This certainly is an extensive case, and it has been pending for a long time. And I hope that we all look to its end in the near future.

I don't know what's going to happen with *Rimini*

II. But at least for this case, I want to see it wrapped up. So thank you very much for being here.

This session of court will be adjourned at this time.

And, Mr. Polsenberg, you can return Peg's salt and pepper shakers. But I appreciate the demonstration.

Thank you very much. The Court will be in recess.

COURTROOM ADMINISTRATOR: Please rise.

(The proceedings concluded at 4:28 p.m.)

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I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

Donna Davidson 7/28/18

Donna Davidson, RDR, CRR, CCR #318 Date
Official Reporter